

**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3**

**22 MAY 1995**

24/3/95

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CHAIRPERSON: Ladies and gentleman, I am not suppose to be chairing this today.

UNKNOWN: But why are you?

CHAIRPERSON: I could also leave if you to, but Patricia De Lille seems to be not here or - by this time, so I am sure she'll arrive in due course. She is suppose to - the PAC is suppose to chair this meeting this afternoon. But the ANC being always ready to take control of everything, we are able and willing to do the job.

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I see the DP is here and the usual number of National Party representatives and ...

UNKNOWN: The DP was here at two o'clock Chair.

UNKNOWN: So was the National Party.

CHAIRPERSON: Well the one representative of the DP was on time. And then we've got our advisors, could I heartily welcome them. Now ladies and gentleman this workshop today, and of

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course the ANC is in force here, welcome comrades as always, ready to act.

I should stop politics now shouldn't I. Now in all seriousness, this workshop today is on inter Governmental relations. Now this is the subject of a submission which the political parties must make if I remember correctly before the 6th of June.

Last Thursday and Friday in Brackenfell, near the Cape, there was a workshop on inter Governmental relations by the commission for provincial Government, a most interesting one in which some specialist from overseas were talking. Among them Professor Johnson from India who is with us today.

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But the aim of the workshop is to address this question of inter Governmental relations. We fortunate to have here today with us firstly from India Professor Albert Johnson, he is Professor of political science at the Modern Cumurage University in South India.

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I won't give you his date of birth because he is very old. But he is - his fields of specialisation is comparative



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Government, international politics and political behaviour. He has extensive teaching experience as well as a lot of very excellent publications to his credit. He - well there is so many pages of publications here, it looks like ten pages of publications. And he also has some other co-curricular activities. I heard him in Brackenfell last week and really enjoyed his inter action in the South African scene.

The other speaker is an old friend of mine, is Doctor Johnson from Canada. Now he has only given me one page of a curriculum vitae, so I can tell you that he is even older than the other Professor Johnson.

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He is - he was born in Saskatchewan in Canada and he was already educated in 1942, so - before most of you were born I must say. But he was - especially made his mark especially - apart from having been very active in the civil service of Canada as having been for seven years the President of the Canadian Broadcasting Corporation, the CBC, the Canadian Broadcasting Corporation.

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And he was three years he was director general of the



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treasury board of Canada as well as three years he was director general of national welfare of the Government of Canada. Two years he was an economic advisor to the Prime Minister of Canada on the Constitution. And he has been very active really he has spent so much of his days after retiring from Government in Canada in promoting South African Canadian relations and advising South Africans on the Constitutional and provincial Government in South Africa.

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South Africa will never forget you Doctor Johnson, I'll personally see to that. So those are our - those are our two speakers. Now at this stage my honourable comrade Patricia de Lille has arrived and I have now introduced the aim of the workshop and she can now take the seat Patricia.

**MS DE LILLE:** (inaudible) ...

**DR DU TOIT:** You must chair Patricia.

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**CHAIRPERSON:** Thank you Professor Du Toit, we'll now ask Professor

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Majola to lead us on the first topic and then just also ask our other two speakers, Professors Johnson and Johnson if you can just take seats in front there with Professor Majola. Professor Majola.

PROF MAJOLA:

Chairperson, ladies and gentleman thank you very much. I have prepared a document which everybody has hopefully got a copy of now together with the other three technical advisors and I have been requested to present the document.

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I think my starting point is that we in South Africa are having for the very first time a Constitution that is dividing Government into various levels. And the Constitution - the Constitutional principles which are guiding us towards the new Constitution also require that we should have a Government that is structured at various levels, at three levels.

And that what we are doing now is not a re-run of what we have done before. We are doing something which is entirely new in the history of the country. Something which we have

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not experienced before if I may so so and for that reason I think that the whole process is a process of trying to find what would be the best solutions for the country when we draw up the Constitution.

That being the case, I felt it unnecessary really to try and go too much into the philosophy of the law, for rather to take an approach that would be more practical to assist the honourable members to try and work out provisions of the Constitution that it is incumbent upon them to - to work out.

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The - I am not going to read the document again but I'll just like to highlight a few points and it looks to us that when a Government is structured in such a way that there are different levels which have got competencies and powers. You find that the possibility for duplication of services of - and of conflict, the possibility of waste which arises out of the fact that you employ many levels to do the same thing, necessitates that you have to have either in your Constitution or in your legislation, mechanisms that would try to enhance more co-ordination, more co-operation

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because if it's Governments - levels of Governments within the same country, then you can not avoid the fact that there will be inter dependence you know amongst the various levels of Government.

But those disputes that inter dependence, has to be managed somehow and that then necessitates the - the provision for inter Governmental relationship, the provision of mechanisms therefore.

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Now we have as I have indicated at the beginning, the Constitutional principles which serve some kind of a beacon that directs the Constitutional Assembly as to which way to move in the drafting of the new Constitution or of the permanent Constitution.

And I have decided maybe just to say that the picture that is painted by the Constitutional Assembly is namely that you have a Constitutional principle no 16 which says exactly what I've said that the Government shall be structured at three levels, which is the national, the provincial and the local level. And then the - the - all these levels are going to

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be given certain powers, especially if you look between the national and the provincial Governments, there will be exclusive powers but also concurrent powers which means that both levels will have to exercise the same powers at some stage.

This where it is necessary to have co-ordination, this is why it is necessary to have mechanisms that will prevent or reduce conflict. I think also this where you would like to avoid duplication and the attended wastage of scarce resources.

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So the Constitutional principles therefore creates levels, but also they create concurrency of powers which creates potential for conflict and other things.

In the framework we have asked the question for instance what mechanism should we adopt to promote co-operation and to prevent and to deal with disputes arising from the exercise of concurrent powers by levels of Governments which those powers are allocated. I think that this a question that we need to look at and try to find an answer

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for when we provide mechanisms for inter Governmental relationships in the new Constitution.

Realising that there might be duplication and - of services and therefore wastage, the Constitutional principles provide in Constitutional principle 19 that such powers can be exercised by one level on behalf of another level on an agency basis or on a delegation basis. The - one area that one would like to look at is who bears the cost of exercising those powers for instance if the national level delegates powers or ask the provincial level to act - to exercise powers on an agency basis, there are cost that are - accompany that delegation and who should bear that.

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You need to work out those things, you need to work out the circumstances under which the national Government can also just exercise those powers if at all, or whether it should no longer exercise those powers while they are delegated things like that. You need therefore a mechanism that will work there.

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The question which we raised as technical advisors was,



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what does this mean in real terms. Then the next level - the next point that I would like to raise is the whole question of resources. I have spoken about you know duplication and wastage and so on and I have said that there is scarcity of resources while it is good for levels of Government to have all these powers that they can exercise.

I think also there is the question of resources, but besides that, the Constitutional principles that is 26, provides that each level of Government shall have an equitable share and the whole question of how you arrive at a equitable share is something that is not very clear from the Constitutional principles and it is something that needs to be worked out so that at the end, you know each Province does get a - I mean such a portion of the national revenue as to be - enable it to function to render the services that it is required to render.

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Now one wonders whether this can be plain put in the Constitution and whether it can be adequately provided for in the Constitution but clearly whatever the case may be there has to be some kind of mechanisms that have to be

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employed in dealing with the whole question of the allocation of resources, the division of the revenue. Between the national Government and the Provinces and amongst Provinces and also amongst the local Governments.

We have in the present Constitution the sections that deal with the financial and fiscal commission. I think they go a way towards providing mechanisms for ensuring the division.

The - in this picture we also see that while the Constitutional principles provide that there shall be various levels of Government it also provides that it protects the levels of Government. In fact it says especially between the national and the provincial Government, you'll find that Constitutional principle 22 provides that the national Government shall not encroach or should not encroach upon the geographical, functional and institutional integrity of the Provinces, which raises the question as to how do you ensure that the national Government does not encroach upon - upon this.

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And I attended a workshop of the commission on provincial



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Government a few weeks ago, I think it was on the 11th of May, and that workshop was attended by a lot of people that work for local Government in South Africa. And I was amazed by the anxiety that these people have, that the provincial Governments are going to encroach upon their own integrity and they wanted an assurance that you know there has to be a way that there will be a way sorry that will prevent provincial Governments from encroaching upon their integrity.

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That to me just underlined the importance of inter Governmental mechanisms. So while the whole question of encroachment appears in the Constitutional - in the Constitutional principles to be focus on the relationship between the national Government and the provincial Governments I think there is also a bigger need to look at the relationship, especially between the provincial Government and the various local Governments within the Province.

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Because there is a fear that the provincial Governments might encroach upon the local Governments. There was an



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overwhelming view at that workshop that maybe the Provinces should not have much say over the local Government in order to try and protect them, that's not what I am saying, I am just reporting that.

But the question which also needs to be answered is what should be understood by the phrase encroachment upon the integrity of the Provinces and one can extend it and ask what would amount to encroachment on the autonomy of the local Government.

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Constitutional principle 18.5 requires that the Provinces, I mean when you deal with this possible encroachment or scenario that may lead to that encroachment, that the views of the Provinces have to be - have to be heard and how do you ensure that the views of the Provinces have to be heard.

Do you use a referendum, do you listen to the legislature - I mean do you consult the legislatures - do you consult the executive of the Provinces or do you structure your provincial Government in such a way that they have a say in

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the national Government.

Those are some of the mechanisms that one can use to maybe to comply with the what do you call, with this aspect of the Constitutional principles.

I have already alluded to the whole question of - of local Government and indicated that there is concern, it does appear as if we may have to think very seriously about the whole question of - of local Government in the sense that the Constitutional principles merely provide that there shall be a framework for local Government contained in the Constitution.

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And the details will be contained in either national or provincial legislation and the danger exist that therefor there might be encroachment, but besides that, I think that there will have to be greater co-operation between the provincial Governments and the local Governments, also there may have to be some co-operation between the local Governments and even the national Government.

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One aspect that is kind of on the side is the whole question of maybe should I call it self determination, that you find in Constitutional principle 34 which envisages that there might be an establishment of a territorial entity within the Republic you know in one way or another and the question is if it does happen, that such an entity is established, it would presumably have some - some powers and the question would be, what would be the relationship between that and other structures existing and what mechanisms would have to be put in place in order to deal with that situation.

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I have looked at the written literature on inter Governmental relationship and my starting point also as far as that is concerned is that we have got a unique Constitution in South Africa. I am not dismissing what is happening in other countries, I am trying, I am saying that we have a unique situation in South Africa and we are still going to draw up our own Constitution.

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And when we - when we look at the whole question of inter Governmental relationships I think we have to bear the fact

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in mind that we have to come up also with the mechanisms that will fit our own - that will suit our own unique situation.

I have tried to give the - preferably the purposes of inter Governmental mechanisms of course you know they are there to help co-ordination to make the inter dependence much more fruitful to all those involved to - to sough - to sort out disputes to prevent them and those that have arisen to try and solve them you know, joined policy planning and things of that nature.

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The question we pose is whether this mechanisms should be in the Constitution and I would like to say that the answer is neither yes nor no, because when you look at some of the Constitutions of the world, that have got inter Governmental mechanisms, you do find that there are those mechanisms which are contained in the Constitution and then there are additional mechanisms.

The advantage, and disadvantages of having everything in the Constitution are pointed out and I am of the view that when you have a new Constitution it develops and because

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of that, you don't want to put your everything in there because you can not foresee the future to start with. But also you restrict development in a way if you got to put that.

And then finally there was a suggestion of what mechanisms, inter Governmental mechanisms that some of those mechanisms are known in other jurisdictions for instance the Premiers conferences. You've got them in other countries for instance Australia and they deal with quite a number of matters you have the Ministerial MEC conferences.

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I refer there to the present Constitution as far as it deals with the present South African Police services but of course those can be extended to deal with other matters.

And relationships don't only exist between a Province and national Government of course they exist amongst Provinces themselves between Province and Province. I have tried to make a very rough example of what can happen and I am begging the members not to look at the reasonableness or otherwise of the example I was just trying to paint a scenario that might arise. That may need co-operation

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amongst the various MEC's you know in order to sort out the problem.

There are mechanisms that could be employed at the legislative level as well as at a administrative level. I have tried to give those mechanisms there.

The one mechanism that we were briefed on was - was the whole question of the Senate. There are suggestions that you can provide a mechanism for inter Governmental co-operation if you structure your Senate in a particular way. For instance if you make it a point that your Senate is a representative, truly representative of the Provinces and you allocate certain powers to this Senate, you might end up dealing with certain disputes or harmonising certain relationships between the national Government and the provincial Governments and that you might also deal with certain disputes that might arise.

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For instance there was the question of the in position of legislation upon Provinces by the National Government. I think that the whole question of the in position can be

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handled in a better way if your Senate is representative of the Provinces, because they would be there to then look at the side of the Provinces and try to present the case of the Provinces in legislative terms.

I think that I should - I should stop here. I would like to admit that the document that we have prepared raises more answers than it applies questions. Sorry it raises more questions than it supplies answers. But of course we are trying to think about what we should have in the new Constitution and therefore matters have to be placed for discussion. Thank you.

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CHAIRPERSON:

Thank you Professor Majola. Indeed it does raise more questions than answers, maybe now in this session we might get some answers from you. We now open for questions and clarity to Professor Majola please. Professor Du Toit.

DR DU TOIT:

I thank you Madam Chair, I just - I am so glad I must say if I may comment that more questions were raised than answers, because that's the way one should go about this type of stuff. Perhaps I could more questions.

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You see I think there is some consensus developing if my feeling is not wrong that we will have a new type of Senate in South Africa. That it is really I get the feeling that there is consensus developing on this matter.

The Senate more in the line of the German Bundesraad in other words one that represent provincial Governments. Now I am starting to worry about inter Governmental relations as such that we don't really think what we have when we talk about inter Governmental relations.

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We will hear about the Canadian experience like it is today where they don't have a central institution for inter Governmental relations. So inter Governmental agencies are developed all over and do a very effective job we will hear from Canada.

But now if in South Africa we will have a new Senate, suppose - we will have a new Senate. Basically as an instrument of linking national and provincial Government and having extensive legislative functions. Then we talk about inter Governmental relations, we should talk about

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executive inter Governmental relations perhaps. Because that - the other part will be handled.

And then the real problem or the questions reduces to the classical question what is regarding the Senate now, what is the relation between the executive and the legislative arms regarding the Senate. For example there is need as you likely point out somewhere, that your provincial Governments will now have a legislative arm in this new Senate. That they decide somewhere or talk together on - as executives on the legislative policies they want to get going, anywhere, through their provincial legislatures, perhaps through the Senate.

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And the questions is really what is the relationship between the executive arms of the provincial Governments and the new Senate. And eventually their own provincial legislatures, and eventually the national Government executive arm.

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The question is shouldn't we just talk about inter Governmental relations if we accept the Senate for the

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moment suppose it's accepted as only executive relations. Then all your things which you recall, mentioned - the mediation, doing needs assessment, joined planning of national policy. That is the function of executive inter Governmental relations.

And then the next question will be do we need a kind of co-ordinating body perhaps annexed to the Senate, or don't we need any national co-ordination of this inter Governmental relations on executive levels. I am putting it very theoretically the questions, thank you.

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CHAIRPERSON:

Thank you Professor Du Toit, yes.

UNKNOWN:

Thank you Chair the - one of the mechanisms - can I shout okay, that's all right. One of the mechanisms that is used in some of the other countries, to deal with a mechanism to mediate the relationship for example between local Government and central Government is what are often non-statutory organisations such as the association of local authorities for example.

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There is no doubt that we are going to have a similar (inaudible) ... developing in our country. That is the municipalities themselves coming together and perhaps as a result of an illegitimacy which they develop then becomes seen by central Government and/or perhaps provincial Government as legitimate institution structures with which to relate too.

Now I just want to endorse what Professor Majola was saying earlier on that we may need to look at - of - at local Government, I don't think we may have to, we actually have to.

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The Constitution says there shall be three levels of Government. And we can't discuss the levels of this Government we found strong reference as it were to local Government. I do agree with the results of the workshops that we are saying that local Government has to be spoken of in equal and strong terms as you do with provincial Government.

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Now what I am asking is do - do the inter Governmental

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relations have to be needed necessarily by statutory organisations or could we also move in the direction that we are going to move it into anywhere by also utilising non-statutory but legitimate institutions, such as association of municipal structures. That's just one question that I am raising.

CHAIRPERSON:

We'll take one more question from Mr Montsitsi and then allow Professor Majola to respond.

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MR MONTSITSI:

Thank you Chairperson. Mr Majola has mentioned in his input that Constitutional principle 34 actually means proviso for an entity to be established. And I am not quite sure whether this entity to establish actually does become subordinate to the local or provincial Government structure.

But I'd be quite happy if he explained what he meant by the establishment of the entity through principal 34.

CHAIRPERSON:

Thank you Mr Montsitsi, I think also the other two panellist, Professor and Doctor Johnson if you want to respond to some of the questions you are free to do so. Professor

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Majola.

PROF MAJOLA:

Chairperson I think the - I think the principle - I'll take the last question I think the Constitution principle clearly says that there might be - that there is a possibility for an establishment of an entity. It says for instance in the subsection to the Constitution may give expression to any particular form of self determination provided there is substantial proven support within the community concerned for such a form of self determination.

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If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new Constitutional text is adopted. The new Constitution shall entrench the continuation of such territorial entity including its structures, powers and functions.

Now I - I do not know the question you are asking what would be the relationship between that entity if it is established and - and the existing structures is a question that I don't know. But I think it's a political question that would have to be negotiated by the stake holders involved.

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I cannot say what would be the relationship. Maybe my colleagues, some of the advisors can try to risk an opinion on that.

As far as the second question is concerned, I - I am - I am thankful for the input. It is also my view if you remember what I said right towards the end that it's very difficult for us to know what will be our needs in future and then to provide for them adequately in the Constitution.

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And thereby I meant that there are certain things that we can provide for in the Constitution and there are things, other things that would then evolve and we can then either follow it up by way of legislation once it has evolved to legitimise it and - or we may just you know adopt it that way.

I don't think that there is a bar towards using non-statutory measures. The program with using non-statutory measures might be that there might not be sufficient control because each level might use its own and so on.

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But I agree with you that would be - that would be possible for instance the association of local authorities. i don't know whether we don't already have that, I was under the impression that I've read somewhere where you do find some name such as association of laws - of local authorities somewhere.

Professor Du Toit raises very difficult questions, maybe that is why I am answering them last. The whole question of what the relationship will be if - if we accept the kind of Senate we thinking about as the Senate for the future South Africa. What would be the relationship between that Senate and the executive, especially the executive arm of the provincial Government.

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And the other question is whether the mechanisms if - if we accept the Constitution - sorry the Senate as such whether they - the mechanism would then be -would - would then be - not be say executive mechanisms.

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I have not given much though on what the relationship would be between the Senate and the executive arms of the

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provincial Governments. It's something that might need to be taken into consideration. I could just risk an opinion at the moment which is not a considered opinion.

I was thinking that maybe if you wanted the - the executive arm of Government - sorry of the provincial Government not to be left on the side, you would want to consider in the composition of the delegation that represents the provinces, whether you don't want to include some of the members of the executive Government in there to start with.

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It may be a complicated idea that I am opposing, it's something that one would certainly need to think about. I think it's a very important question. The whole question of whether under those circumstances the mechanisms would not be executive, I tend to agree that yes because the Senate would then maybe take care of the - the legislative problems that might arise, one would say so.

But no entirely because I think one Province may pass legislation which is (inaudible) ... to another Province, a neighbouring Province, and what do you do then? Of

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course you can deal with this also at executive level where - through the Premiers conferences and to - through the MEC conferences, you can still deal with it. So I tend to agree with you Professor that yes you can deal with it at executive level and I think it is much easier that way - that way if it's dealt within that way.

And finally the whole question of the national co-ordinating committee, the necessity or otherwise of such a committee I can say that it would depend on the needs of the country. I am not for or against it, I think that it's something that can be tried and tested.

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Plainly I do not - if you have mechanisms at ground level for instance you have your - your MEC's - you have your ministerial and MEC's you have got your Premiers conferences and so on, what would the national co-ordinating committee do.

I think that it's something that might be considered in the course of time depending on the need for it arising. I think - my own approves of course is that we should allow a great

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deal of development and evolution and so on.

I am not have answered your questions.

DR DU TOIT: No - no you proceeded.

PROF MAJOLA: Thank you.

DR DU TOIT: You made progress.

CHAIRPERSON: Yes Professor Johnson?

PROF JOHNSON: I'll tried to - I'll try to respond to the question raised with Professor Du Toit that here in the hand out of Dr Majola it says that if the Senator (inaudible) ... achievement in the national assembly is adequately (inaudible) ... of provincial Governments, this may certain enhance the - and harmonise the co-operation and good working relationships between the national Government and the provincial Governments.

I will go one step further and say that it need not be a adequate representation but it would be equal

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representation of provincial Governments. If the provincial Governments were to see that their voice is here there and since from what I heard a little earlier and also during the workshop which I had and that (inaudible) ... that the idea is that the national Government would be the dispenser of the finances to the Provinces (inaudible) ... to the local bodies.

If that were to be so, then I would say that the local bodies also should be given representation in the Senate. That is my submission.

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Then instead of going by the beaten path of following the pattern of any other federation or any other unity State (inaudible) ... second chamber, I would say that from our experience in India, we find that the money that is given by the State Government to the local bodies or to sudden local agencies for the uplift of the down trodden people, now enriches them.

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Because there is no proper mechanism to see whether the money has been actually utilised for the (inaudible) ...

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which it was allocated. Now I would submit that the Senate could be given that responsibility, by forming different committees, so that you know they could review the performance of different bodies in tune with the money that has been made available to them, thank you.

CHAIRPERSON: Mr Manie please.

MR MANIE: Chairperson I want to follow on - on the point that was raised by Mr Lechisa Senoly and that is the - it seems as if that local Government is not really seen as an area where the inter Government, the whole concept of inter Governmental relationship extends that far.

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Even in the way that the Interim Constitution has addressed it, and although Professor Majola is right, previously there did exist various federations and associations for local Government. But with the new transitional councils, it's just disappeared, it's status is completely unknown. People are trying to get these things done at a provincial level.

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But there is no national attempt to bring that together and



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perhaps that is one of the issues that needs to be raised in the Constitution - Constitutional affairs, portfolio committee that it is actually responsibility to ensure that, that thing is not left out.

Now I am glad that the issue was raised because the actual status - it's decision making power and how binding decisions are taken at that level, how it actually applies to local Government, needs to be captured somewhere and in my view I think it should be taken up very strongly.

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The second point that I want to raise is around the whole Min Mec, the Ministers and MEC's. Although I agree that there is a need for it, but unless we going to clarify the status and the powers of these meetings, then it's just going to become a talk shop. Because perhaps it's part of the process of going through this experience of a new system of Government. But certainly the way things are going now, we are totally unclear about whether decisions taken at that level can in fact be enforced on certain people.

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So it's an area that I would like the panel to respond to

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whether in other experiences these various fora conferences of whatever form, whether in fact have the power to enforce their decisions on older people who are suppose to be part of that.

DR DU TOIT: A status (inaudible) ...

MR MANIE: The status of their decisions and also the powers accorded to them.

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CHAIRPERSON: You want to have a follow up.

UNKNOWN: It doesn't (inaudible) ... on the - you say spescifical (inaudible) ... on the Interim Constitution. Does say whatever level of Government cannot interfere with the powers of local Government once those have been given to them.

But, and it says without having to consult local Government.

But in what way, what form it's not quite clear, that's another issue that could we have some comment on that.

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And could we also specifically invite Professor Johnson from Canada to talk to us unless it is in his input about the - for example the role of the federation of Canadian municipalities and whether in fact they play any specific role in terms of inter Governmental - in the topic that we are discussing now. Ja thanks.

**CHAIRPERSON:** Can I have response to that Professor Majola.

**PROF MAJOLA:** I missed the (inaudible) ... made question Chairperson, Chapter something. 10

**UNKNOWN:** Chapter 10 of the Interim Constitution says the higher levels of Government cannot interfere with the powers of local Government once those have been devolved to that. Without consulting local Government, but exactly what that means, and what form does that consultation say, it's not clear.

And what I am asking is we are - some of us are arguing that we need to retain that in somewhere but perhaps in a clearer formula in a slightly better formulation then it 20

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currently is.

What one wanted to know is as a specified manner of relating to this levels, could we have some comment on how firstly perhaps other views about how that could be improved, or whether in fact that formulation needs to be in the Constitution in the first place. Some of us believe so but we would like to have other views.

CHAIRPERSON: Professor Majola. 10

PROF MAJOLA: Chairperson thank you very much. I - the comment by Mr Manie I think it is - is it a question, I thought it was a comment.

MR MANIE: Yes it was a comment, but also a question.

CHAIRPERSON: Long question.

MR MANIE: Okay we can leave it as a comment. 20

PROF MAJOLA: Well if you don't mind can you please repeat it, I thought



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you were making a comment that you feel that their has to be a tying together of what I could call the loose ends because you say there use to be these federations and so on, but with the advent of this transitional authorities they have kind of moved to the (inaudible) ... and so on. Wasn't that what you were saying and I tend to agree with you.

MR MANIE: There is a need for it.

PROF MAJOLA: Ja I think there is a need for it, yes and you wanted to know 10  
amongst other things what - how consultation, how they can be consulted, was that your question.

UNKNOWN: (inaudible) ...

MR MANIE: Could I - could I ...

PROF MAJOLA: Well I am coming to the next question I was talking on the  
local authorities.

MR MANIE: Ja in fact it's on both of those questions that I pose -  
(Inaudible) ... is not really seen as an area where the

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intergovernment, the whole concept of intergovernmental relationship extends that far. Even in the way that the Interim Constitution is addressed in and although Professor Majola is right, previously there did exist various federations and associations for local government but with the new transitional councils it has just disappeared. Its status is completely unknown.

People are trying to get these things done at the provincial level but there is no national attempt to bring that together and perhaps that is one of the issues that needs to be raised in the Constitutional affairs portfolio committee, that it is actually responsibility to ensure that that thing is not left out.

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Now I am glad that the issue was raised because the actual status, its decision making power and how binding decisions are taken at that level, how it actually applies to local government, needs to be captured somewhere and in my view I think it should be taken up very strongly.

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The second point that I want to raise is around the whole



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Min Mec. The Ministers and MEC's. Although I agree that there is a need for it but unless we are going to clarify the status and the powers of these meetings, then it is just going to become a talk shop because perhaps it is part of the process of going through this experience of the new system of government but certainly the way things are going now, we are totally unclear about whether decisions taken at that level can in fact be enforced on certain people.

So it is an area that I would like the panel to respond to whether in other experiences these various fora conferences of whatever form, whether in fact have the power to enforce their decisions on all the people who are supposed to be part of that.

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**UNKNOWN:**

The status of their decisions.

**MR MANIE:**

The status of their decisions and also the powers accorded to them.

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**CHAIRPERSON:**

Do you want to have a follow up?

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UNKNOWN:

(Inaudible) ... of the Interim Constitution does say that whatever level of government cannot interfere with the powers of local government once those have been given to them but, and it says without having to consult local government but in what way, what form, it is not quite clear.

That is another issue that could we have some comment on that and could we also specifically invite Professor Johnson from Canada to talk to us unless it is in his input about the, for example the role of the federation of Canadian municipalities and whether in fact they play any specific role in terms of intergovernment, in the topic that we are discussing now. Ja, thanks.

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CHAIRPERSON:

Can we have response from you Professor Majola?

PROF MAJOLA:

I missed the penultimate question which was chapter something.

UNKNOWN:

Chapter 10 of the Interim Constitution says the higher levels of government cannot interfere with the powers of local government once those have been devolved to that, without

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consulting local government but exactly what that means and what form does that consultation say, it is not clear and what I am asking is, we are, some of us are arguing that we need to retain that in some way but perhaps in a slightly better formulation than it currently is.

What one wanted to know is as a specified manner of relating to these levels, could we have some comment on how firstly perhaps are their views about how that could be improved or whether in fact that formulation needs to be in the Constitution in the first place. Some of us believe so but we would like to have other views.

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**CHAIRPERSON:** Professor Majola?

**PROF MAJOLA:** Chairperson, thank you very much. The comment by Mr Manie I think it is, is it a question, I thought it was a comment.

**MR MANIE:** It is a comment but also a question.

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**CHAIRPERSON:** Long question.

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MR MANIE: Okay we can leave it as a comment.

PROF MAJOLA: Well if you do not mind can you please repeat it. I thought you were making a comment that you feel that there has to be a tying together of what I could call the loose ends because you say there used to be these federations and so on, but with the advent of these transitional authorities they have kind of moved to the prolifery and so on. Wasn't that what you were saying and I tend to agree with you.

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MR MANIE: There is a need for it.

PROF MAJOLA: Ja I think there is a need for it, yes and you wanted to know amongst other things what, how consultation, how they can be consulted, was that your question?

UNKNOWN: (inaudible) ...

MR MANIE: Could I, could I ...

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PROF MAJOLA: Well I am coming to the next question I was talking on the local authorities.



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MR MANIE: Ja in fact it is on both of those questions that I pose the Min Mec as well as the local government associations, the question was also with regards to the status of decisions taken at those levels.

PROF MAJOLA: Ja that I have got.

MR MANIE: Should it be catered for somewhere and should those things be in the Constitution? Are there examples elsewhere? So it was a very broad open-ended question.

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PROF MAJOLA: Well the whole question of the status of the meetings and the decisions taken in Min Mecs is a tricky one for the simple reason that if you know exactly what they are going to be dealing with, then I think you can say the decisions should bear particular status, they should be enforceable and so on.

But some of the things that they will be dealing with are real things that need to be negotiated because, especially where there is concurrency of powers, you may find that there has to be a lot of negotiation and the give and take that has to

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come in which may go in a way, contrary to existing, not contrary, but may move away from the provisions of existing legislation or the Constitution. I would venture to say that it is necessary, yes, to have them, to give these meetings enforceable status but you might scare away people from going to those meetings because governments might not want to lose their powers that easily. They might want to make interim arrangements. They might want to make arrangements that will enable a particular programme to go away without you know, being forced in future to tow the line, and in my view, it is very difficult to say that they must just have the enforceable status.

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I think you may be able to categorise and say decisions in this area could be enforceable but not all of them, you see, because these, I think these meetings also play a very big mediation role, you see, that you are going to limit the capacity to mediate if you are going to require that everything has to be compulsory, that every decision taken there. That is my view. I do not know if Deon is here, Professor Basson is here, maybe he could share a view on that.

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Then you did point out that if they are not made compulsory they would be just talk shops. While I agree with you that a possibility exists that they may just be talk shops, I think that they will still be useful because I do not think that it is only where there is a force of law that you can achieve certain objectives. You can achieve certain objectives where people are free to take decisions knowing that it is entirely upon them to do that. I do not think it would be entirely useless to, you know, to have them even if the status of their decisions is not enforceable by law. I think the question that came from the last speaker was actually trying to invite Professor Johnson from Canada to try and come up with a situation in Canada.

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**PROF DU TOIT:**

Madam Chair, on the order of the meeting could I address you? I am afraid that we are running a bit behind time at the moment.

**CHAIRPERSON:**

I am talking about the same thing ...

**PROF DU TOIT:**

Perhaps we could hear the inputs of the other two experts and then have another discussion at that stage.

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CHAIRPERSON:

Thank you Professor du Toit, I was just going to ask member to hold their questions after we have listened to the next presentation but one, I think Mr Manie who requested Doctor Johnson to say something on this issue. Maybe we should just allow him to answer and then move on to the next presentation. You will cover it in your presentation. Thank you.

Ja, so we will move to the next presentation, Inter-governmental mechanism in Canada. Doctor Johnson?

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DR JOHNSON:

Thank you Madam Chairperson. Honorary members, I want first of all to thank you for the great privilege of having been invited to appear before you. I also apologise for my voice, I seem to have contracted laryngitis especially for the purpose, but maybe I will resumè more as a consequence.

I was very flattered by Professor du Toit's introduction. I will add only one little balancing factor so that you will all know where I am coming from. I spent as many, if not more years than provincial government than I did in national government and having had been involved for many

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many years in the very kinds of intergovernmental relations that you are talking about.

I will, my purpose is to try to say something about the facts of Canada's reliance on national provincial conferences, federal provincial conferences as we call them, and some of the factors that lead us to rely upon them.

I will not be talking about local government. In Canada, local government, partly because I did not prepare myself to, but in point of fact in Canada local governments fall under the exclusive jurisdiction of the provinces and the national government, when it does make forays into fields like housing for example, through a central mortgage corporation, when it makes forays into fields of local government it does so with great care and usually resulting in a lot of beating over the head from the provincial governments. So I will not be talking about local government, we could talk to one another in the question period.

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Well first of all some facts. You have in front of you in

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pink, a copy, a little bit of piece of paper to which I will refer as I go along. First of all the facts, just bare facts. During the past five years over 90 meeting of Ministers or DG's (Directors General) we call them deputy ministers, were held each year, around 90 and this is only a fraction of the interchanges that take place between officials at various levels say between the level of chief director and on to the service deliverers in the field.

Virtually all functions of government are involved in the interchanges that take place between officials, ranging as you will see if you look at Annex 2, alphabetically from agriculture through to transport. I do not know that there are many functions of government that you could not find on this list. I will not go over it because you have it in front of you, unless you want me to speak to it. You will see that it ranges from agriculture to environment, to health, to finance, even to housing, justice and the rest, transport.

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It is significant I think, when you look at the numbers, it is significant I think that the greatest frequency of meetings is to be found first on Constitutional issues. Secondly on those

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functions of government where programmes, where conditional programme grants are paid to the provinces by the national government and I refer to conditional grants in the field of health and human resources and social services.

The third category in terms of frequency has to do with those functions where national and provincial jurisdiction or competencies are unclear (and I will explain to you in a moment why they could be unclear) such as the environment.

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The fourth factor where jurisdiction is shared and justice and solicitor general meetings here are an example of that. So I will now come back to the reasons that we have such an extensive use of national provincial conferences as I go. The question of the structure of such conferences was raised. I think it is difficult in Canada to speak about a structure of national provincial conferences since they are not created by the Constitution in the first place. There is no reference to them. More than that they are held more or less informally.

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That does not really extend to meetings of the Prime Minister and the Premiers, they call themselves the Conference on First Ministers. They are held in great, should I say pomp, great ceremony. They occupy centre stage. They are televised all across the nation except for the in-camera meetings where they really make their judgments, I will not say decisions yet, but for the most part they are informal.

The structure of course is the most important, conferences, the conference of first ministers, and they are held infrequently, once a year, once every 18 months on average, except during our periodic reviews on the Constitution. I must say to you that if you were a Canadian, if you were Canadians you would know that we have had a steady diet of Constitutional conferences, the reasons for which will become apparent, I hope, in a moment.

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Then you have the next level down, the conferences of DG's, of deputy ministers as we call them, which clearly are mirror committees to the ministerial committees. I should have said before DG's there are conferences of ministers in

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virtually all fields and then there are conferences of DG's which are mirror committees of the ministers and there is a wide range of other conferences. If you want to look at the Annex note, I will do that in a moment. I will look at it now. If you look at Annex 1 you will get some idea as to the kinds of structures or kinds of conferences that are held, it is, at the top of this, by the way I got this list from our cabinet office, the federal provincial relations secretary of the cabinet office, just recently.

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You will see at the top there is something called Formal Structures. In fact these are just meetings of ministers but they have tried to, I think, give some emphasis to their importance and to their status by calling them councils.

Another reason for doing it is that if you have a council instead of a national provincial meeting, you do not have to have the National Minister in the chair. In Canada that would be regarded as a joke. Ministers of the environment, energy ministers, forestry ministers, transportation, highway safety ministers, committee of ministers on internal trade. Among the more informal ministerial meetings you will see

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that in the last nine months we have had meetings on finance, transportation, seniors (that is guys like me) labour market, agriculture, sports, recreation and then in the next six months they will be meeting on agriculture again, housing, health, Aboriginal affairs.

DG level (deputy minister level) you will see again lists of the numbers of conferences that have been held and that will be held over the next six months. Over the next six months there are what, nine of them to be held. So you can see the frequency, the breadth and the frequency of the meetings that are held in Canada.

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What gives coherence to this profusion of meetings? Well, it is a good question. I think one thing that gives some coherence to certain of the conferences is the imperatives that prevail. I will not direct your attention now to, but we might want to return to the charts at the end of this paper which deal with the fiscal arrangements. The fiscal arrangements between the national government and the provinces. I will come to that.

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There is some coherence however, I mean, well let me just say the imperatives of inter-governmental conferences on fiscal arrangements lie in the fact that in Canada, unlike your Interim Constitution, our whole Constitution is based on the concept of dividing responsibilities, competencies, dividing revenue fields, occupying revenue fields as opposed to sharing and this makes a huge difference in the way in which we function and I will be referring to this difference between our Constitutions as I go.

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But frankly, back to the coherence question, the coherence that is found, is sought, really arises through the presence in the Prime Minister's office and the presence in most Premiere's offices, almost all of them, of an inter-governmental affairs secretariat or sometimes called a department. Almost always they report to the Premiere, and the purpose of course is to keep the Premiere and in the national government's case the Prime Minister, aware of what is going on in whenever you have public servants (of which I was for many, many years) whenever you have public servants who put their, coordinate something, they build a bureaucracy and then they start advising. That if

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there is a coherence in the federal provincial, national provincial conferences, I think it would arise from those mechanisms.

Let me shift then to some of the factors which I think have contributed to Canada's reliance on national provincial conferences. The first one I have almost made reference to, namely the character of our Constitution. As far as the competencies are concerned they are divided into two watertight compartments, national responsibilities or functions, and provincial, and any strain by the National Government, this was done in 1867 when the inter-dependency that we talk about so easily now, was not readily apparent. Not only that but we had four provinces coming together and they stretched, ultimately they stretched over 5,000 kilometres. But it seemed possible then to think of these watertight compartments and any strain by the National Government in the provincial jurisdiction was seen to be unseemly and it could only be justified in extreme circumstances such for example as in an emergency, and talking about not the way the Constitution reads and talking about the way it is functioning.

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Over time however, it became to be recognised that there are national aspects to provincial competencies and there are provincial aspects to national competencies. Almost always this is the case. But in Canada we had no Constitutionally accepted vehicle to enable the National Government to legislate our national aspects of provincial fields. You have Section 126 in your Interim Constitution. We have no such thing.

It was the courts in interpreting the Constitution that did  
decide that the National Government, while it might not  
legislate on areas of provincial jurisdiction, could spend in  
those areas. So we have had in order to achieve national  
social services, in order to achieve universal medical care  
and health care across the country, in order to achieve social  
services across the country, we have had the National  
Government offering to provincial governments conditional  
grants in these fields providing that they would, national  
bears 50% of the cost say, providing that the provinces  
respect the principles or the norms and standards that are  
established in the national legislation, in the conditional  
grants legislation.

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It was through this judgment of the court and the use by the National Government of the spending power that we built this fabric of social security and health measures which now, I think it is fair to say about virtually all Canadians except for Quebec nationalists, that represent for us one of our bonds of unity. For me with my biased background it is the Canadian Broadcasting Corporation plus these bonds that are established by what, by a value system we share because that is what health insurance, that is what social security, that is what they are all about.

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Having said that, Quebec in particular, followed by certain other provinces has never been able to reconcile itself to the creation of this national integration by the courts of this national spending power. Their view of course I think you will know their view is that the autonomy required for Quebec, the national autonomy as the nationalists would put it, required for Quebec calls for not a national power to intervene in the provincial jurisdiction but calls for greater autonomy for the province.

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Now the question is how you get here from there. That is



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what government is all about. What was wanted was more power, take it from Parliament give it to the legislative assembly of Quebec. But if you do that either the other provinces are going to say "hey wait a minute, I want to come along this train too" or in the alternative you say to Quebec well if you want these powers in the national assembly of your province, remember that your members of parliament and senators are not going to be able to vote on measures that will not apply in Quebec (inaudible) ...

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So we have had series of conferences on the extent to which we could increase provincial autonomy while at the same time maintaining what bonds of nationhood are essential to our country. I say again if we had had a well defined and carefully prescribed or circumscribed as the case may be 126 in our Constitution, I think we would have avoided a great deal of, a great many of the travails through which we have gone in federal, national provincial relations. Well that is one reason we have used a lot of conferences, national provincial conferences because we were discussing the Constitution so much and because the amending formula which we now have provides that the Constitution may be

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amended by action of the Prime Minister and the Premiers.

A factor all in itself.

The second factor that has caused us to rely on these conferences I think lies in the very conditional programme grants that I was talking about. On the one hand if you establish conditional grant programmes you will create the circumstances under which harmonisation has called for. The whole idea of a shared cost programme, as we call them in Canada, the whole idea is something like framework legislation as a matter of fact is to have the national establish certain principles that will be observed by the provinces and to have the provinces operate the programmes.

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So harmonisation of policy and practice, harmonisation of policy programme and delivery of services is a necessary function to be performed. In the Canadian experience we just see it as normal but the unfortunate fact is also (by the way Canadians are great for confessing their sins and their weaknesses and I am doing a lot of that this afternoon.)

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Along with that unfortunately there was the fact that Quebec and followed by certain other provinces, consistently regarded the use of the spending power as politically illegitimate and challenged it in the courts but they regarded it as politically illegitimate and so the imperative of national provincial conferences, centred not only on the question of harmonising, it centred also on disputes concerning the legitimacy of the spending power.

I come back to another aspect of the Constitution and that is dividing revenue fields, as between the National Government and the provinces. Another factor in our use of, may I say, federal provincial relations as we would say in Canada. Once again the difference between our respective Constitutions, in Canada the provinces and the National Government have full access to all tax fields except that the provinces may not impose duties, customs duties.

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As a consequence of the, what happens when you have this situation and it prevails today? Well first of all you face the question of what on earth are you going to do about the unequal per capita tax yields, as between the rich provinces

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and the poor provinces? You have got to do something about that.

Now we did not do anything about it until we had gone through a depression and a war, World War 2 but we finally developed an equalisation formula that essentially (I will give it in a very summary form) essentially guarantees to all provinces roughly the national average per capita yields from provincial taxes at national provincial rates, through a combination of what the province raises itself and an equalisation payment that takes it up to the per capita national average approximately.

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So you have to, and what did you have to get there? I was privileged to be involved in the development of the equalisation formula and we had meeting after meeting after meeting and these are very early stages of the development of federal provincial relations in Canada, with officials, so that the ministries could always disown them, in the negotiation of an equalisation, the consequence or the type of Constitution we have, we do not share taxes as envisaged in Section 155 of your Interim Constitution, we divide

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ourselves over them, or we divide them up by - we had other problems as well, what about, how do you prevent a tax jungle as we used to call it, when you are at meetings and finally we arrived at a system of tax collection agreements under which the provinces, not forced to, but the provinces agreed that they would for the most part enter into tax collection agreements under which the national would collect the taxes, providing the provincial tax laws, the tax base, corresponded with the national law. So we work toward something that is explicitly provided for in your Constitution.

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We had meeting, also we still have meetings over tax sharing, because what you people are saying, we are going to share the taxes, we are going to have a Fiscal and Financial Commission, it is going to have to advise on this and it is going to be a very bubbly kind of advice and so on. In Canada the tax shares are established by the unilateral actions or court or mildly harmonised actions of ten provincial governments.

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Well if you are going to try and harmonise those tax laws

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you have a vehicle for doing so and we have used federal provincial conferences for achieving this.

I had hardly refrain from expressing the view again as I have read your Constitution and heard something of your discussions about, that the sharing approach, the sharing of revenue rather than dividing the rights to tax, with the benefit of the Fiscal and Financial Commission, probably would give rise to less disputatious meetings between your MEC's for finance and the National Minister of Finance, than our system but that is a personal view.

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You met at our workshop recently where another Canadian, Ron Watts was there. If Ron Watts were talking here, and he is a professor of federal provincial relations at Queens University, he would be saying the exact opposite to what I have just said. Well sometimes there is a difference, being in the civil service for a long time, being in politics for a long time, you learn how the range of differences narrows. As a matter of fact when you assume responsibility, it looks a whole lot more difficult and a whole lot different than before you have any responsibility. Well anyway let me not

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try to turn into a floor speaker because I have never been one.

Another factor I think is this one. Still talking about why and how you use national provincial conferences. The closer you get to the services delivery level and to the analysis that flows from the very delivery of services, the policy deficiencies that you discover, the policy concerns that emerge, the closer you get to the delivery services level the more frequent the national provincial and the inter-provincial contacts become.

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The reason is really simple. Everybody involved is devoted to the same end. You get a bunch of social workers together and they are not going to be arguing over the national and provincial jurisdiction, they are going to be worrying about getting the social services to the people. The same thing applies in health. So that the character of the meetings changes, I think first of all they are very very much more formal, they may be person to person but secondly, the orientation changes. You will extract yourself, the closer you get to your concern for programmes for

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people and for the delivery of services to people, the more devoid the discussions are of jurisdiction, because unfortunately governments do worry about jurisdiction.

I have deliberately talked about the factors that have influenced us in Canada. I may have sounded as if I did not really place in a high position the need for harmonisation. That need is self-evident. I think it is self-evident no matter what kind of two tier system of government you establish.

It may be more prevalent in our system, the divided responsibility system, I believe it is, that it is in your shared responsibility approach in the Interim Constitution but I emphasise that harmonisation is an essential function at the executive level.

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Now I am coming to the senate. I have left it to the last. I guess it is the last because my time is running out. In Canada we have, effectively we do not have a senate that reflects the interests of the provinces. We have a senate, it has representatives from the provinces but it is appointed by the Prime Minister and the long and short of Canada's senate is that it by and large it is a patronaged body. So it is not really looked on as being a factor in national

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legislation. At least certainly not a provincial representation factor.

The consequence of this is that, never mind the executive level harmonisation of which you were speaking earlier, even at the legislative level and the Appropriation Act level, there is no body which speaks for provincial interests. If you do not have that and if you do not have a senate that is clearly regarded as being a representative of provincial interests, then you do not have anything in the national government system that assures something that is fundamental, I said at the beginning as sure as the national government looks at the provincial and local aspects of legislation, just as through Section 126 you have a vehicle by which the national aspects of provincial legislation can be looked at.

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So the place of the senate, I am merely repeating what others have said and what all the literature will say, the place of the senate is extremely important and to the extent that you do not have one in our experience, you then turn to what? You turn to national provincial relations, federal provincial conferences where you fight out the differences

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between you in respect of these several aspects.

I conclude with a word about the status of the conferences. I have no hesitation whatever in saying their status is one of influence, it is not one of power. It is a status of influence for the simple reason that it does not exist as a Constitutional body, the Constitutionally authorised body. Its status is influenced because the public of Canada recognises and I think they recognised this in a relatively recent referendum on Constitutional matters.

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It was not chosen democratically. The National Provincial Conference is not chosen by the people. My wife who is one of these right-hand side brain people, you know, she will show her financial statement and she will go and play the piano. Ruth says to me 'listen I voted for the national government and I voted for the provincial government but who are those guys I watch on television, all these Ministers sitting around and saying they should be making decisions.'

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So the status is that of influence. They cannot, they may try to make decisions but in the final analysis they must each



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must go back to his or her own parliament or legislative assembly and seek the authority of the caucus and seek the authority of the whole legislative body. (inaudible) ... stop my remarks there and if there are any other matters that I wanted to get into I might bootleg them into an answer to another question. Thank you.

**CHAIRPERSON:**

Thank you Doctor Johnson for the informative presentation. Senator Bhabha you are first on the list for questions and clarity.

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**SENATOR BHABHA:** Thank you Madam Chair, I am glad to know that my adherence to a particular system is not merely ideological, it has some practical implications

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n as you  
have just  
confirmed  
but I just  
want to  
ask you a  
question  
h e r e  
regarding  
the status 10  
of these  
intergover  
nmental  
forums.

If a senate is created whereby the composition of the senate would not only be more representative of the provinces or would be representative of the provinces, but where a particular competence, if a Bill touches a particular competence then the executive member of the provinces is, 20  
or personally comes to the senate, would that not then negate or remove the need for having intergovernmental



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forums? Would that purpose, would that not serve the purpose of intergovernmental forums?

DR JOHNSON:

I find it difficult to visualise an elected body. I am sorry, it would not be, in your case it would not be an elected body. I find it difficult to visualise a legislative body dealing with essentially administrative matters and I am making the same distinction that someone else made earlier on, between the legislative function and the administrative or executive function. About the legislative function, I have not any doubt that if, in my mind, though I personally prefer an elected senate but to be practical about it, if you were going to assure the presence of the provincial governments and representing provincial interest, then you would have the kind of senate which you mention.

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I have not given any thought to the question you pose as to the presence, for example of individual MEC's in respect of individual legislation but it is an interesting question. When I think about the administrative aspects of legislation, you know, I, when you have been a practitioner it is down here and it is hard to bring it up there.

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I will give you a simple illustration, in Canada for historical reasons the National Government is responsible for unemployment insurance. The provincial governments are responsible for education, exclusively responsible for education and so they provide the training function that should, is associated with the unemployment insurance function.

Now you might talk about coordination nationally, you know, in Ottawa (inaudible) ... clearly services delivery level, to repeat myself, you have got to harmonise your efforts in order to help the citizen, and I am not assured that legislators are in the best position to do that.

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I am not afraid of executive harmonisation, if you can remove the disputatious part of intergovernmental meetings that arises from a lack of agreement over when the national may move with respect to provincial aspects and vice-versa.

If you have a senate that achieves that then it seems to me the cast of the character of the intergovernmental meetings changes, which to me is the really important part of it.

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**CHAIRPERSON:** Thank you Doctor Johnson. We will take two more questions and then break for tea at 10 - I mean at 4! I am sorry. I have Mr Ken Andrew and then Mr Carrim and then the next one will be Mr Praveen Gordhan.

**MR ANDREW:** Yes, thank you. Professor just on something you touched on I would like to, the issue of fiscal equalisations or the transfer and relating to national average tax yields and that sort of thing. What mechanisms or what processes do you have so that you do not eliminate incentive to provinces to either be efficient in tax collection or any other of the factors, if in fact in the end it is going to be completely equalised?

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**DR JOHNSON:** Shall I answer that Madam Chairperson?

**CHAIRPERSON:** Can we, can you take them down and answer them after tea Doctor Johnson. Thank you.

**DR JOHNSON:** Ja, ja.

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**CHAIRPERSON:** Mr Carrim, your question.

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**MR CARRIM:** I just wanted to ask, how does this special status that Quebec claims impact on the practice of intergovernmental relations because I think Quebec has more powers than other provinces or are they, or is that not true?

Then I notice that you refer in your document to provincial and territorial structures. How do these territorial structures differ from the provincial and in what way are they drawn into intergovernmental relations?

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**DR JOHNSON:** Thank you.

**CHAIRPERSON:** Mr Gordhan?

**MR GORDHAN:** Yes, Doctor Johnson my question is at a more general level, sorry I am behind you here. It is what one might call a macro question. It is intriguing that as one studies more and more federations, there is this interesting contradiction between on the one hand the political demand, as you have also recognised, for more power at a provincial level, and a greater stand off between the National Government and the Provincial Government on the one hand. And on the other

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hand these elaborate mechanisms to actually get intergovernmental cooperation on the other hand. Now what is this a symptom of in your view? Is it a symptom of the fact that in fact ordinary people throughout the country, whichever province they come from actually want to live there and they want to lead a decent life.

But the political leads and political parties are the ones who actually want this notion of provincial powers and provincial autonomy and in fragmentation of, or political fragmentation of a country. In that context what advice would you give to us in South Africa? Should we also practice this, what amounts to almost nonsensical exercise of political divisions being entrenched in Constitutions in a very harsh and divisive way on the one hand and on the other hand then go into an elaborate exercise of developing intergovernmental relations, either in the Constitution or by legislation or by voluntary mechanisms. What, from the Canadian experience can you teach us in that regard?

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CHAIRPERSON:

The last question from Mr Cronjè.

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MR CRONJÉ:

Maybe just to add to that one. I am sure that you know when those people got together in 1867 part of the reason why they wanted autonomy is because they thought they were somehow different to each other and then they, through some Constitution which was based on that type ideology only to discover that it is in discordance with the practicalities on the ground. Now given that we have now got provincial legislators and they, there is nothing yet said about where they shall meet. I am not talking about Senators who come from the province now to the national but it seems to me from what I experience on the ground that it is the provincial legislators who never get a national overview.

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In other words that they are not really so, the problems are not really so different that those are the people that somehow will promote the centrifugal forces, the splitting apart, the competition, the, you know, we are different type of thing.

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Now shouldn't one perhaps then also look at provincial legislators at some point coming to the centre to get more



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of a national perspective to find that they are not so different?

CHAIRPERSON:

Thank you Mr Cronjè. We will now break for tea and come back at ten past four. Thank you.

This question is for us and any other members of the panel that wish to do so. Thank you.

DR JOHNSON:

Thank you Madam Chair. The first question had to do with fiscal equalisation and how Canada avoids removing the incentive, removing from the provinces that have incentive to advance in a particular way, in their own particular way. The short answer is there is an incentive built in. In the first place the equalisation formula brings the provinces, all provinces up towards the national average. Now I have to get a little bit technical here. What we used in the formula was the national average provincial tax rate, weighted of course, but a national average provincial tax rate and we apply that to the provincial tax base e.g. retail sales for general sales tax and say that would yield so much per capita, that national average rate would yield so much per

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capita, how much would it yield national average. You apply it there and you get a difference and the national government accepted a difference.

That means however, that the provinces that are above national average or above whatever national law has set, enjoy a higher standard, a higher level of per capita revenues because they are above the national average. That is reason number one.

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Reason number two. The provinces all have the power to impose higher tax rates. To put it in terms of the Interim Constitution it is almost like saying the provinces have a Constitutional right to impose surcharges. So that once again you have the power to do different things.

Now I came from a province where we started, you know, as a hospital care and then universal medical care. We were a poor province, we were well below the national average at that time, still are but closer, and we just simply raised the taxes and the people were prepared to pay the taxes for universal medical hospital care but we had the complete

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freedom to do that. Helped of course enormously later on by the equalisation formula. Is that - Special status for Quebec ...

**CHAIRPERSON:** Just a second Doctor Johnson.

**DR JOHNSON:** I beg your pardon.

**CHAIRPERSON:** Mr Davis just wants to ...

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**MR DAVIS:** I just want a point of clarification. Could I ask a point of clarification on that? When you talk about the national provincial average, is that, how is that calculated, is that a combination of the national tax rate and the provincial or ...

**DR JOHNSON:** Just the provincial. You see what we were trying to do was develop a formula, to put it very bluntly, that was political proof, so we said we are not going to make any judgments in this formula. We will make no judgments about what is the right level of provincial taxation.

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We said we will simply take the facts of life as we find them,

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what is the national average provincial tax rate? Now I am not going to get into the formulas, I probably have forgotten them anyway but, and we abided to the tax base. Just again it is factual, we had, we exempted no, there were no revenues exempted. That has posed some problems by the way, they were during the oil boom and so on but I will not get into detail.

So that the only thing that one can do is if one wants to tamper with the equalisation formula, which now by the way has almost, the purpose of the equalisation formula has now been enshrined in the Constitution.

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The only way to tamper with it would be to say it has become too expensive and we have to lower the national norm and that has happened in Canada because of our fiscal problems.

But for any politician to say I am going to take this revenue out and this revenue out, you know perfectly well it is happening. You can penalise one province or penalise another province, depending on which taxes you include and

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which you exclude.

MR DAVIS: The point being that once you have worked out this national provincial average, I cannot understand what you were saying then about, that per capita for the province as it were should give you X. If the province is getting in Y does it get the difference between X minus Y?

DR JOHNSON: Yes.

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MR DAVIS: Now what happens if ...

DR JOHNSON: You are talking about the higher income provinces?

MR DAVIS: Yes.

DR JOHNSON: It is not equalisation to the top.

MR DAVIS: I appreciate that.

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DR JOHNSON: Shall I go on, Madam Chair?

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CHAIRPERSON: Yes please.

DR JOHNSON: The province of Quebec. No, province of Quebec does not enjoy more legislative powers than the other provinces. The nationalists have argued that they should have, particularly here, that they should have special status, but for reasons that I mentioned a moment ago that simply would not work or it was not acceptable.

What we do have, and we had all this national provincial conferences that I talked about. What does exist however is the use by the national government of the power of administrative delegation i.e. we delegate to the province of Quebec the administration of aspects of immigration laws for example. So that there is a kind of defacto asymmetry if you will, that arises from out of this power of administrative delegation. 10

The question of the territories. I knew as soon as I got these tables, I would have to explain the territories. Canada's population, I think 75% of Canada's population lives within 500, 750, no, 750 to 1000 kilometres is the US 20



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border. 30 million, 28, 29 million people spread across like that.

From way north the provinces extend quite far north. North of that right up to the Arctic circle island do you find the territories. The territories are very sparsely populated but many years ago (I can tell you when, it was in the 1960's when I first moved to Ottawa) a movement, the national government decided that the people of the territories would be granted the right to have a legislative assembly. That can be done by statute because parliament controls the territories. Give to the territories the right to have a legislative assembly and the right to have a government, the right to receive money from the national government but they do not enjoy provincial status i.e. they do not have any Constitutional status.

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But because we are going through, I bet I was going to say going through these motions, but because we have these structures provided for by law as opposed to the Constitution, the territories are included in the National Provincial Conferences. If you had ever been up there you

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would understand why the population is so small, it is cold.

Provincial powers. Let us see now. The question had to do with whether South Africa should accept competitiveness. I think these elaborate mechanisms to which you referred do have something to do with the political elites yes, sure, and they have something to do with bureaucratic elites as well, sure. But it is, and I respond with another sure it is, the people want the delivery of services. They are not as interested in which government provides the services.

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My own judgment is that, well you have heard me say it again and I will say it very quickly. I think that in any two-tier system of government, federal government, whatever, must have vehicles through which the national aspects of provincial matters are expressed and the provincial aspects of national matters are expressed through one vehicle or another. You maintain, you keep the grassroots in mind, released through the political process, through the constituency system. That is how it happens in Canada.

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It is not just the provincial governments that are close to the



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people, it is when, on a constituency basis, you are close to the people, you are going to have to get their votes and if you do not pay attention to them you will pay the price. That is the kind of competitiveness that we have. It becomes a political competition to listen to the people as opposed to not to listen to them. Now I may have misunderstood the question on this so I beg your pardon.

Provincial legislators and whether or not they have, how do they get a national view? Well I was talking to Senator Lamenc and she told me something that I did not know and I find enormously interesting, namely the fact that the senate refers legislation to the provincial legislative assemblies. I have never heard of that happening and I must say, as I said I find that very ingenious.

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I could take the other point of view very easily, from having sat around a provincial legislature for a long time, that one of the beauties of the two-tier system is that the provincial legislatures do exist to reflect a local and provincial point of view and they are close to the people, and they do deliver services. I speak for the Canadian situation. They deliver

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services much more effectively than if the national government tried to delegate the districts. So that in a certain sense I think it is a good thing that the provincial legislators represent the provincial constituency or constituencies. But it certainly is true that they remain provincially oriented or if you (inaudible) ... parochial, how is that? It would take some special vehicle such as the one I have, the senator mentioned to overcome that. I think those were the questions that were asked of me, Madam Chair.

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**CHAIRPERSON:**

Thank you Doctor Johnson. I want to request members to hold their questions until we have listened to the next presentation. We will now ask Professor Johnson to lead us on the Indian experience. Thank you.

**PROF JOHNSON:**

Madam Chairperson, members of the committee, my learned colleague, I must at the outset thank you for giving this great opportunity to be with you today. Well I do not think I will be very technical in my presentation and I shall stick to the way in which, you know, the things have developed in my country over the past 43 years.

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We came to our (inaudible) ... Constitution which came into operation in January 1950, so now it is a little bit over 43 years that we have had this Constitution. Though most of you may be aware of the great diversity which characterises India, with over 1600 languages and dialects spoken all over and many (inaudible) ... groups and also the (inaudible) ... to house it. Also the unique problems which we faced at the time of our deliverance in 1947. The Constitution makers took it upon themselves to draft a very detailed Constitution so we have now the lengthiest Constitution in the world which goes on increasing day by day with the number of governments which have been added during the past 43 years, which is near about 100, and the region which this tendency goes, I do not know, maybe the Constitution would end up in the beginning of the next century.

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Similar to the British order we inherited the, we adopted to ourselves, the British parliamentary factor of government and our Constitution does not say that India is a federation, though it qualifies to be one because of its size and diversity. So the word (inaudible) ... is used.

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I think the original intention was not to grant a federation for the country but in 1950 and 1956 the administrative units in India were grouped under four categories. In 1954 to be precise a gentleman fasted until death and actually died because he wanted the creation of a particular state on linguistic grounds. So the first of our Prime Minister Jala Leroo who was dead against this idea of fragmenting India on linguistic lines, saying that this will ultimately, yet with the distraction of the whole country, was totally against this idea but then he was compelled to agree to the granting of linguistic reorganisation of states.

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So in 1956 the entire territory of India was re-organised on linguistic lines and today we have 25 states and seven union territories. Excepting for one state, Jamon Cashmir, no other state has its own Constitution. So what should be the Constitutional structure, framework, for the states is prescribed in the Constitution itself. It is more or less a replica of the National Government.

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At the national level we have a (inaudible) ... we call the President, at the state level we have a governor and then at



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the national we have the Prime Minister, at the state level we have the Chief Minister. The position, powers and the responsibilities of the national as well as the state legislatures are more or less similar.

Then our Constitution does not say anything about the local government institutions, both rural as well as urban. This has been left to the total responsibility of the states concerned so the states take into account their own position.

They can unite legislation and create whatever bodies they want to create, so, so far as the organisation of structuring of local bodies are concerned there is no uniformity in India.

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Some states have a single tier administration of local bodies, some have two, some have three and some have four, and my state, one of the southern states, it has a three tier structure so far as the local government is concerned. So their organisation, their powers, their modes of revenue, all these are determined by the state legislation.

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So what the Constitution concerns itself is only with the

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state governments and as the provinces are responded out in the, in his people, we have two sections in the Constitution which deal extensively with intergovernmental relations and they are broadly divided into two categories, one is administrator relations and the other is legislator relations. I will also add one more, that is the judicial relations.

Now so far as administrator relations are concerned, I shall make mention of the state executive. The state executive normally he is the governor who is nothing but a nominee of the national government and he deals the technical term of the Constitution. He serves during the pleasure of the president, that means he is not a functionary who is totally (inaudible) ... with his state mechanism but he is at the beck and call of the national government.

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Until 1967, till then the Congress Party was India National Congress who was having control over the national government as almost all the state governments. Then the position of the governor was nothing but a puppet in the hands of the local Chief Minister but since 1967, one by

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one, different states began to have different political parties as their ruling parties. So now in more than 12 states there are different political parties involved and if the report I signed last night on the TV is right, then I think the International Congress is heading for destruction during the next elections which are due in 1996.

So, so long as the congress had absolute control over the entire country, interim governmental relations between the national government and the provincial governments was not an issue at all, because, for one reason, that is the national parties in India are totally centralised parties, unlike the American parties. Indian political parties are absolutely centralised, especially the India National Congress. So all decisions whether pertaining to the national level or the state level or to the regional level, all decisions are taken only at the topmost level, whether it is deciding the candidature of a particular individual or for any other practical solutions.

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So in the course of the past say, I would say 30 years or so, the Congress Party has lost its grip over the regions and this

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has led to the emergence of a number of regional parties which clamour for autonomy or more powers, because they speak for the regions and they find out that the International Congress is more concerned about parliament and not concerned about the state at all. So here we are, we are to speak for it.

So certainly the people (inaudible) ... more and more regional parties are being elected to power and this has put a further strain on the federal state relations.

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Now the governor's position today, under the changing circumstances, that fierce (inaudible) ... acting, acting in the sense that there are certain portions, obnoxious provisions in the Constitution which I think you should very carefully avoid while framing your Constitution, that the National Government in India has an absolute control over the state governments, even under normal circumstances.

We can understand it if motions are made in that direction during an emergency, during a national emergency, that is of course permissible. Whereas even under normal

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circumstances the national government can have an absolute control.

It can even go to the extent of deciding the destiny of a state government irrespective of that state government enjoying the people's mandate, as it has happened for over a 100 times in India. No state has escaped this. All states at one time or other have experienced this, that is the national government, without asserting any reason whatsoever could dismiss a state government and get away with that. So this is a non-justiciable provision in the Constitution.

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What the Constitution says is that if the President is satisfied or a report from the governor, or other ways that the Constitutional missionary in a state is not in a position to function according to the Constitution, then he can dismiss the government of the state concerned.

So herein there are two provisions, one is a report from the governor, that means the governor is required to submit periodic reports to the national government about the way

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in which the state government is functioning. Second is, are other ways, that means there are also other channels through which the national government collects information regarding the functioning of the state government.

Now this is a provision in our, which the opposite parties are demanding to be scrapped from the Constitution because it cuts at the very root of the democratic parties in our country. So I will request you to bear in mind that when you draft your final Constitution, see to it that the national government does not have any over(inaudible) ... influence over the state government so far as the retention of the government or the dismissal of the government is concerned.

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So far as the legislative powers are concerned, there are three lists, exhausting lists in our Constitution. One is called the state list, there is a senate list and the third one is a (inaudible) ... list. All those powers, you know, which do not find a place in any one of these three lists, are called the residual powers.

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The residual powers have been assigned to the centre so even under normal circumstances the centre has an enormous amount of legislative powers and a very significant factor here is that a state legislator is elected by the people. The state legislator by the Constitution is required to unite for the state concerned all the subjects which are included in the state list. Okay.

Now, after the state legislator has passed that legislation, the next stage is it goes to the governor. The governor assents to that and then it goes to the president. After the president has assented to that the Bill becomes law. That is the procedure, but here if on a particular Bill the national government does not have in agreement, it can direct the governor to reserve the Bill for the consideration of the president. So the Bill after it has been passed by the state legislature would be reserved by the governor for the consideration of the president.

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The President can do one of two things. 1) He can straight away direct the state legislator to modify the Bill or he can refer the Bill to the advisory opinion of the Supreme Court.

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In fact, that happened on four occasions in Indian Constitution history. A very damaging Bill was enacted by the communistic government, the first communistic government which is found in one of the southern states. Most of the population was against that because that Bill was meant to cut at the very root of educational freedom.

So since there was so much hue and cry against that Bill the President referred the Bill to the advisory opinion of the Supreme Court and the Supreme Court (inaudible) ... that certain conditions should be removed and the same information was passed on the state legislator and after the State Legislator took appropriate action according to the directive, the Bill was assented to by the President.

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Apart from this exceptional circumstance, even under normal circumstances, any Bill which is not to the liking of the Union Government could be dispensed to it through the instrumentality of the governor, that happens. But here, let me be a little more technical here, let us say that the Bill has been received by the governor for the consideration of the President and the President examines that and then he

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requires the State Legislator to reconsider the Bill within a period of six months. Let us say the State Legislator reconsiders the Bill within six months and asks for the directives of the President, makes the appropriate amendments and re-submits the Bill through the governor to the President. What happens next?

The Constitution is absolutely silent. But wait, the President has an absolute veto over state legislation, which power he does simply enjoy over national legislation. So this is a point of controversy so far as the states are concerned.

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As a rule, even the subjects which are eventually on the state list are not (inaudible) ... We have in our National Parliament, two houses. The Council of States is the upper house and the House of the People is the lower house but please do not be misled by the term Council of States. It does not represent the states. It has only the name.

Now if the Council of States passes a resolution that the Union Parliament should enact a law on a subject mentioned in the state list, the parliament can proceed in

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that direction. You need not get the (inaudible) ... of the state concerned or if two or more states request the Union Parliament to enact a law on a state subject, the parliament can do so and that law would be applicable only to those states who required such a legislation. Whereas under the Government Act of 1935 it was provided that in such a (inaudible) ... if at a later date one of the signatory states does not want that legislation, it can repeal it. But the present Constitution does not provide that provision. So once the parliament enacts that law that remains in the statute book.

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Supposing there is controversy within the Union Parliament and the State Legislator over a law enacted on a concurrent subject, what will happen? In that case only the union law would prevail, not the state law. It is (inaudible) ... being assented to by the President that the state law would not prevail, only the union law.

So even under normal circumstances legislative powers are more in favour of the National Government than at the disposal of the State Government.

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Then coming towards the way in which the financial resources are shared within the union and the state, there is no permanent yardstick by which that is being done because our Constitution says that periodically (that is once in five years) parliament may appoint a finance commission and the finance commission would go into the question of centre state financial position, look at the volume of intake, volume of revenue on the part of the states as well as the centre, and also take into account the per capita income in each state and then, according to formula, it will advise parliament as to how funds are to be allocated between the (inaudible) ... different states.

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(inaudible) ... the report of the finance commission which is to be subjected to parliament need not be approved by parliament. Parliament is free either to accept the report in toto or to reject it in toto but so far it has not done so and funds are allocated only according to the formula which is arrived at by the finance commission.

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The money that is allocated by means of this arrangement is the tax revenue. You see we have three weeks in which

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to raise taxes. There are several items of taxation which are of elastic nature which go on increasing. For example income tax. Income tax can be levied only by the Union Parliament and not by the State Legislators. That is something which belongs exclusively to the Union Government. Customs and excise duties, corporation tax, mint tax and then surcharge on income tax. All these, the last six sources of revenue are at the total complete disposal of the Union Government.

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Other local items of taxation are given to the states. Then what about the local bodies? Local bodies cannot decide on what items they should tax and how much they should tax. The items of taxation at the local level and also the quantum of tax that they should collect will be decided by the State Legislator by law. According to that they collect the money but then they can only collect the money, cannot appropriate that money.

The money that is collected by the local bodies is to be directed to the fiscal judiciary and the State Government will decide how much each municipality or (inaudible) ...

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should receive. So that is how that system works at that particular level.

Now the, this particular issue of disparity in sharing revenue has been a one of contention between different states for quite some time, and in fact from 1964 onwards a number of State Governments have wise to concern. In fact every finance commission has received the submissions from different (inaudible) ... from different states, for including corporation tax as a tax that should be divided within the states and the centre.

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What is this corporation tax? Corporation tax is nothing but tax on the income of companies and since, you know, it goes on increasing, the share of the Union Government goes on increasing and the states want a share of that but the Union Government does not want to share because the Constitution itself is very specific as to what items of taxation are to be shared within the union and the states. Only those taxes are shared. The others taxes exclusively belong to the Union Government so there is, you know, a great disparaging in the source of income of the states as

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well as the National Government.

Now apart from taxes, there are these grants. There are three types of grants available in our country - statutory grants, discretionary grants and capital grants. Now statutory grants about which provision is found in the Constitution, grant in aid.

So the parliament can decide the quantum of grant that is to be made available to a particular state and this is usually done on the recommendation of the finance commission.

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Then what is a discretionary grant? Discretionary grant is a weapon in the hands of the Union Government because we have an institution going to the planning commission. Of course the Prime Minister wanted to have or wanted to transform India into a socialistic society so he thought, you know, the best way to do that is with the help of a planning commission. So he created a planning commission which today is a supra national body.

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There is no legal provision for them and there is no



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(inaudible) ... provision also but the creation of a planning division. But it has become very important and very powerful and it is the planning commission which, in a sense, as to how much a particular state should receive for implementing such a plan.

Then the money that is required for the implementation of a particular plan by a particular state is given by the Union Government by the discretionary grants, and now of late, the Union Government is also making use of another insignificant provision in the Constitution. A provision which says Miscellaneous Provisions Regarding Tax Share. That is being used for giving block grants to the states, saying that it is in the national interest, even though the (inaudible) ... need not follow that particular pattern. So that is the position there.

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Then if this is the position then what is the manner in which the interests of the states can be protected? Well supposing, first point, the interests of the states cannot be protected in the Union Parliament because the upper house does not give equal representation to the states, because the

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upper house is elected by the Legislative Assemblies of the states and then there is no equality of representation. Representation is based on population of different states.

So more populous states can have the final say in most matters whereas the least populous states will be left in the lurch. That is the unfortunate position there.

There is provision in the Constitution for the creation of an interstate council for resolving any disputes between states. 10

There is a clear provision for that but to date such a council has not been created. Whereas periodically there are meetings which are held in Delhi. They may be education ministers' meetings or they may be finance ministers' meetings which are, of course there is no provision in the Constitution for calling such meetings.

It is decided at the (inaudible) ... of the National Government. So the education ministers of all of the states assemble there and then according to the agenda that is 20 prepared and finalised by the National Government, the meeting takes place. Then what about the court here, in



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case there is a dispute between states or a state and the National Government. Well that comes under the ordinary jurisdiction of the Supreme Court. If there is a dispute between two states or between one state and some other states, or between one state and the National Government then it can be directly referred to the Supreme Court, but if individuals are involved that cannot be taken to the Supreme Court. So this comes under the ordinary jurisdiction of the - and of course in many cases have gone to the Supreme Court for final adjudication.

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Then what about the position of the local bodies, local government institutions. I believe that in certain operations like the United States there is provision for direct federal assistance to local bodies whereas in India such a thing does not exist.

That is why I earlier said that there must be provision made in the Constitution for direct financial assistance to local bodies and also a mechanism to see that the assistance that is made available is made use of for the purpose for which it has been made available. Unless you know it is because

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this is from an Indian experience. I do not know how many of you are aware of that. Probably gentlemen of Indian origin have made a distinct law, there is no less than 14 demands currently in India for greater autonomy or separate statehood or even total freedom, mostly in the northern belt and also, or not to in the southern belt and if you go into the merits of each one of these you ...

**[ END ]**