

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

CORE GROUP MEETING:

1 JULY 1995

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UNKNOWN:

(inaudible) ... start with an input on the Attorneys General and that we then discuss that issue first and perhaps get back to the professional leaders after that.

I believe from Noel that Professor Hayson will be with us at two o'clock which is the only time that he could fit in, so we may just have to have a bit of flexibility in our programme then.

UNKNOWN:

I haven't prepared any formal input. I wasn't sure what was going to happen at this meeting. But what I can just do is just run through some of the things. I don't - will take it much further than probably what you've picked up in your reading.

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The - there seem to be a range of concerns that run through many of the representations. And also I think a sense that many of the concerns lead to - to rejecting solutions that are in fact not threatening the concern expressed.

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The first issue is obviously that of independence. And I think the significant point is that currently the independence

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is not guaranteed through the constitution, but in fact through the Attorney Generals Act. And the manner in which that reflects, that relates to the Constitution at the moment.

I think there should be a big question mark as to what independence means. Because I think it's a mistake merely to acquaint the position of Attorney General with judges. Or even with someone - of the character of the public of the public protector.

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And I think for this reason, the Attorney General does implement policies that have their origins in their executive. In a way that neither the - a judge does who decides on a case by case basis or someone of the character of the public protector. He clearly has a quiet historically different characteristics to other civil servants, but there - there is a closer relationship to the executive than with any other - within for instance with the judge.

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UNKNOWN:

What is that to be - is that a good thing?

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UNKNOWN: It's - can I say that it - it's not a question of whether it's a good or bad - it is inevitable. Prosecution is a manner of enforcing state policy, which has it's origins in the executive.

UNKNOWN: Policy or the law?

UNKNOWN: No - no - I don't think it's - I don't think we need to concern our thoughts about enforcing the law, but I think the - if you want to draw me on it - there are many aspects where the law establishes crimes and how the Government enforces those.

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Well there is a large area of discretion in how they enforce. Now I'll give you one example that I know well, so I think it does reflect many of the issues, for instance a question of mind safety. Which is now coming into the public arena and occupational safety in general.

There has been a policy in many countries that the killing of somebody in a work place is not really a serious matter and if people get prosecuted, they either get prosecuted in regional courts or magistrates courts and not Supreme

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courts. Or the fines are very small. Or in fact there are not prosecutions in many cases whether they prima facie cases of negligence.

So that for instance an industry, a mining industry there are 600 people killed in accidents a year. On average there are two or three prosecutions of culpable homicide. If you take the other example for instance, you know, serious economic offenses as they now called.

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In the 1970's and 1980's if you - you know robbed a bank, provided you didn't use a gun, you got away with a very small fine. There was clearly a shift in policy, because of public perceptions, because of a moral panic over corruption, but nowadays those crimes are prosecuted hard and people get very serious penalties.

Now there was clearly a shift in policy. Emanating from a number of Government departments over those issues. And like it or not, there are many cases in which an Attorney General can choose not to prosecute. Without violating the law.

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But anyhow I don't - I mean, it doesn't seem that those - I mean those are factual questions about how we evaluate the role of the Attorney General and I don't think there is any great difference between the parties.

The key issue really seems to be the issue of - of you know who should the - the authority - who - or should there be an element of national authority? And if so, who should that vest in? Currently the authority to prosecute vest in the Provincial Attorney Generals and the Minister of Justice as a co-ordinator.

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There seems to be no opposition to the co-ordinating role and therefore no opposition to a form of national accountability.

UNKNOWN:

No, well I think (inaudible) ...

UNKNOWN:

No, can I - can I - I mean there seems to be at the moment a large number of parties favour the status quo. And all those parties are there for assuming the current level of accountability to the Minister of Justice. Precisely what that

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accountability is, is another issue, but it does exist and if you look at what the Attorney Generals or what Mr Van Leerer says, he argues those in fact a very strong form of accountability.

So, the point I would make and if I - if I am misreading your comments, you must tell me, was that there seems to be consensus that there should be a national structure of some sort. And some form of national persona. Dealing with matters of prosecution.

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UNKNOWN: No I don't think (inaudible) ...

UNKNOWN: Where the disagreement - if you - I mean, if you're - is that there is no-one who doesn't argue - as I understand it and maybe the parties can indicate - that either the Minister of Justice should continue to play his current role or that there should be something new created in the form of a directive public prosecutions or a national Attorney General. Which are the two terms.

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As I understand it, that is - that is common ...

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(intervention)

UNKNOWN: What do you - what do you - what would you argue is the present role of the Minister?

UNKNOWN: Well I don't know if we have to argue about it Danie. It is set out in the Attorney Generals Act and he act as a co-ordinator. I mean if you look at the summary of what - you know, if you're saying it's wrong, then you are in disagreement with the type of view being expressed by the national Attorney Generals. 10

We say for instance, the Minister of Justice as co-ordinator of the activities of the AG's, provides more than sufficient scope for reliable communication of State policy.

UNKNOWN: I do not understand your view - the point you making I am sorry but I am being a bit dumb. You say - firstly you say there is consensus and then you refer to the two positions which I think are opposing positions. 20

UNKNOWN: No - no there is consensus - there is consensus on the need

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for some person national in the process. That's what I am saying. The disagreement is as to whether that is the Minister of Justice on the current scenario or you know a specialist national AG/Director of Public Prosecutions. I mean that's the - that's the point I am making and as I understand it, there is either a view that the status quo is a right. The Minister of Justice can continue to play his present role.

Or, there is a view that you need - the Constitution needs to embody the - the executive power to prosecute in a single - (inaudible) ... of a better word national Attorney General. As I understand there is no - there is no - between those two positions is a - is one common theme. There are no national aspects to prosecution. No one denies that.

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There are National policies in prosecution. The one view is that the Minister of Justice is an adequate structure to perform that function of co-ordinating conveying policy etcetera. The other views not there is not. So what I mean, the reason why I've presented it this way is to try and draw out what the area of consensus is.

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And maybe we should discuss that. But it seems that there is a currently a national element and that would remain if things continued on the status quo through the role of the Minister and the primary opposition to that is the idea of something being hived out of the Minister's powers and moved into the creation of a national office.

UNKNOWN:

I think that's partly correct, but I think part of the debate and maybe that is why people are feeling a bit confused, is I think that the part of the disagreement is also about the relationship or the strength of the relationship between your provincial and your national person. I think at the moment there is a relatively weak relationship between the Minister and the provincial AG's. And I think our proposal is that there should be a relatively strong relationship between a national AG and provincial AG's.

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So I think that's just the second area of disagreement apart from the kind of structural one that has been pointed out, Doctor van Heerden.

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DR VAN HEERDEN:

Chair just a question Mr Chairman is the idea then as I

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understand it, the Minister presently is just co-ordinating in an administrative capacity. It's not concerning the institution as such, so the other view then is that you would like - well not - that's what you are telling us that the other view is that there should be a national AG for that matter who will decide on prosecutions.

And who will kind of co-ordinate in the idea of prosecutions - is that correct?

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UNKNOWN:

Yes, I think the view for instance, most - I think it's probably most clearly expressed is by Nico Steytler from UWC who is giving a bit (inaudible) ... there. He really argues that - I suppose the argument essentially justice is a matter of national competence. And you therefore need a national person to assume a central role and therefore he argues for the (inaudible) ... idea of the national Attorney General and that the discretion should rest in him and thereafter should flow from him to the Provincial Attorney Generals.

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All that all the questions of clear about independence could

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be dealt with through (inaudible) ... which is the Attorney General is appointed and his independence (inaudible) ...

UNKNOWN: (inaudible) ... Mr Chairman, unfortunately I didn't attend the - I presume this is the written submissions of the evidence that you've listened to, is that correct in Johannesburg. Because I haven't had ...

UNKNOWN: No I think some of these Steytler's made a written submission to us as well, it's in these fat packages that we all got.

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UNKNOWN: This is all Cape Town, ja.

UNKNOWN: Mr Chairman I think, from our side, we believe that there are at least five things that must be dealt with. First of all the Attorney General is responsible to institute prosecutions. I think that's already in the Constitution. Secondly, that he should be independent. We would argue that he should be impartial as well. Thirdly, that he should be accountable to Parliament.

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Then we would like to suggest that - and I don't know whether we have already dealt with it, but there should at least two Attorney Generals be represented on the JSC. But be that as it may. And the Attorney General should be appointed by the JSC.

And then - and that I don't yet have a solution to that. But I think we should, if we can, provide for the independence of the prosecuting arm. I mean we've have had fairly strong representations about that. If that can be provided for, I mean - I think we should go for that. From our side, that more or less is the guidelines that we would like to propound.

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UNKNOWN: Any other views - (inaudible) ...

UNKNOWN: I don't know, not clear and specific, you say the Attorney General, should he - do you accept that it can be a she in the first place. And secondly that ... (intervention)

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UNKNOWN: (inaudible) ...

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UNKNOWN: (inaudible) ... and secondly that it would be one person?

UNKNOWN: No I think - I think that goes beyond in we accept that each - each provincial high court (inaudible) ... have his own Attorney General. And we believe it's good for independence, it's good to secure integrity. And it - they - such a person will be more effective. How could you expect a guy in Pretoria deciding on a matter in (inaudible) ...

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So, I think it would be better that we as far as that is concerned, we fairly - we feel fairly strongly about the fact that there should be Attorney Generals in every in every Supreme court or High court (inaudible)

UNKNOWN: I think - I think then it would help if we can could talk about the things that we agree on. And then isolate those on which do not agree.

UNKNOWN: All right.

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UNKNOWN: I think we agreed - that there needs to be a Attorney

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General in each division. Whether you call it high court or provincial division - all of us have agreed about that.

UNKNOWN: Okay.

UNKNOWN: We agreed that the Attorney General must be responsible for prosecutions.

UNKNOWN: Okay.

UNKNOWN: Are agreed that he must be independent. Are agreed that he must be accountable. There must be a form of accountability. Now we can come back to that. No - no we just talk about the issues on which we agreed.

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We can talk about the appointments of the other AG's. We can talk about that, that is the AG's of the Provinces. We can talk about that, maybe the chair says should do that when we are open. We are not saying yes, we are not saying no.

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I think the issue where we are not agree and I think that is

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the issue we need to talk a little bit about. Is that we need to have it at national level. One person who is going to be able to co-ordinate all this. And we are saying let's apply all those principles we should apply to the rest of the AG's. Must be independent, must be responsible for a number of things, but over and above - must be responsible for co-ordinating the work of this.

But that one we say, must be accountable to Parliament. The national AG - so that form of accountability comes in there. He is accountable to Parliament.

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UNKNOWN: Ja, but you don't - you don't think I mean when you talk about co-ordination, you are not talking about co-ordination, you talking about supervision.

UNKNOWN: No I mean look, what essential are we talking about?

UNKNOWN: Essentially - the direct question is, can he over ride a provincial decision, that's the point.

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UNKNOWN: Ja, and the answer is yes. If we take for example the case

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that was quoted by Paul here. Take the mining safety thing. One AG decides in the Gauteng Province that he doesn't prosecute for those deaths in the mines. The one in North Western the Platinum decides to prosecute, where there is a case of negligence.

Obviously there are going to be discrepancies in that case. Somebody has to take the decision and we saying the national AG must then be in a position to say no, I want you to prosecute in that case. I want to prosecute in this case so somebody has to take that decision and we think the national person must do that.

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UNKNOWN: Then you can also make a decision that you must not prosecute - not to prosecute.

UNKNOWN: That's where the problem lies.

UNKNOWN: The problem lies, that's where the problem lies.

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UNKNOWN: Yes sure - sure but what safeguards do you now have when the AG's decide not to prosecute? Because even now the

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AG's ... (intervention)

UNKNOWN: Well then (inaudible) ... prosecution.

UNKNOWN: Obviously, that's what I am saying, I mean, this does not make your case any better. Because the AG now still has that discretion not to prosecute, but you have seven people taking all those decisions at the present moment. That's why I was talking about the question of co-ordination.

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In the instance we are talking about, we are saying that we shall have one person. You still have your safeguards. You have your remedies. And not only that, you also - this person must come and account to Parliament. If Parliament is going to ask him - why didn't he prosecute in this particular case?

UNKNOWN: I think our problem is just and I really don't think it is being satisfactory answered. Is that no where in the world where there is a national system of laws or national laws - do you have different provincial AG's or State AG's to decide whether or not and to what extent they have applied

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those laws.

Every where in the world there is a uniformity of the application in our law. And I think as we argued yesterday - it - to not have an equality of application of laws is probably unconstitutional at this stage. And the only places I know of where there are sort of autonomous AG's at the State level, is when they are applying State laws and State constitutions.

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UNKNOWN: The (inaudible) ... relating to is before Parliament.

UNKNOWN: But that's Parliament cannot over ride them, that is the point. So it's citizens can still be treated unequally before the law.

UNKNOWN: All right but if they then act unconstitutionally they can be thrown out or something like that.

UNKNOWN: They can't.

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UNKNOWN: Pardon?

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UNKNOWN: They can't that's the point then they exercise their discretion
you know.

UNKNOWN: Their discretion cannot be changed. I mean they may be
saying that they're not - a citizen may have some remedy.
I am not sure what. But I think all we are asking is what -
except for entrenching the position of people that were
appointed under the previous Government. What is the
motivation for having 7 or 9 or how many different AG's
rather than having a single AG - as the situation is in all
modern democratic countries.

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I mean the relationship between the executive and the AG
is something we can talk about. And what safeguards one
wants around political interference. But I think the
perception is just being created for us, that this goes more
about entrenching the jobs of certain people that about any
particular arguments of merit.

UNKNOWN: But I think that's the last thing I've thought about of
entrenching any of the AG's position really and I don't think
that (inaudible) ...

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UNKNOWN: No but I think the point must be made that those positions, in any event, are entrenched, we are not threatening those positions.

UNKNOWN: Ja. Final decision.

UNKNOWN: On the contrary, and this is why sometimes I have difficulties, I think this thing is important to me, because I think it is a question of mistrust somehow. I think it is a question of mistrust more than the actual proposal itself. Which is the stumbling block in this case.

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I thought we were taking some of that co-ordinating functions of the Minister, away from the Minister and putting them in a professional person. Because at the present moment, that function it is being performed somehow. But of course, we are giving - we giving this person - this new person that we are talking about, at least more powers than the Minister does self.

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But in a sense we are taking some powers away from the Minister.

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UNKNOWN:

But (inaudible) ... can I just raise a main concern? And that I think rose - rose clearly out of the presentation by Paul here. And that is that this man is to be used as a political function. And to be used to implement Government policy. And that is wrong.

There are particular guidelines for an Attorney General to in law, as to whether and in what circumstances he should prosecute or should not prosecute. And that he should be bound by. And he should be bound by the law and for that very reason, I think that there is safety in numbers. To ensure integrity.

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If one of them is out of line, then clearly it will show up. They will be accountable to the present, to Parliament. I think the present situation is working fairly well. I can't see, I can't think of any real difficulties that there are and in the last instance, they can effectively deal with the matter in that Province.

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You can't expect the central guy and sitting in Pretoria to decide on all prosecutions on murder for instance. There

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are hundreds. There should be many thousands.

UNKNOWN:

You know you got the Paul referred to is it Stadler of Steytler's and I don't know whether you referred with approval to it. But what - what Steytler proposes here is totally unacceptable to me. And he says the national Attorney General should be appointed by the Minister and shall perform his/her functions under the direction of the Minister of Justice.

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Now what does that mean? Doesn't it mean that the Minister of Justice can tell the Attorney General that you will not prosecute Ms Marike de Klerk. She has got involved in a kidnap case, but her husband is a Cabinet Colleague of mine. And I don't want you to embarrass the Government by prosecuting Mrs De Klerk.

And is says ... (intervention)

UNKNOWN:

(inaudible) ...

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UNKNOWN:

Ja and then it says here it has to be done in an open and

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transparent matter. Put some notices in the Government Gazette. I don't wish to prosecute Mrs Marike de Klerk. It hasn't sorted it out from my point.

UNKNOWN: (onhoorbaar) ek wil net vra jy sê daar is geen navrae soos ons wat daar kom Prokureur Generaal toe nie, die lande wat jy voorstel - isn't there any only, is there a Minister of Justice, they don't have a Minister of Justice they just have a (inaudible) ... - en Amerika is 'n voorbeeld - wat gebruik jy vir 'n voorbeeld?

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UNKNOWN: Well I think America is an example where there is a national Attorney General who is a politician.

UNKNOWN: Politician.

UNKNOWN: Now I don't think we are advocating that.

UNKNOWN: Ja.

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UNKNOWN: I think if you look at most other countries, you tend to have a person who is so a politician who is responsible for the

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area of prosecutions in one way or the other. As well as a separate person who is the national Attorney General or the Director of Public Prosecutions - is the normal model.

But nowhere do you have a politician supervising or however responsible for or however you define the relationship for 9 or 10 or 15 or 50 different Attorney's General. And I think the reason for it, is that it is simply not practical.

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UNKNOWN:

I think this come to the real problem. Because the problem is as articulated by Danie I think and supported by that. Is the fear that we want sort of a political person who is going to abuse his office. I think that is the fear. And to the extent that is so, I think that's the fear that we have to deal with.

The proof of the matter is, that in this area of work, there is a vast area where one has to utilize his discretion. One has to use his discretion. And of course one has to use his discretion based - one, firstly (inaudible) ... the law is. But also secondly, one has to implement the Government policy.

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In an extent, there is a relationship between the prosecuting authority and the executive, there is a relationship. So that discretion has to be guided by a number of those things. Because here the person who is prosecuting, is prosecuting in the name of the people. And the Government is representing the people of the country. We are talking about a democratic society.

And to that extent, yes, that is natural. It has to be there. You can't run away from that and you can't deny it. That therefore in exercising that discretion - who ever the person may be, is going to be guided by this factors. There is going to be the question of his own personality is going to come into the picture. And I say again, the Government policies are going to come into the picture. You can't ignore those. You would be wrong if you would do that.

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So, you can't run away from those things. They are going to be there - even if we don't have one national AG. We have seven AG's. All of them are going to take this factors into account.

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Then, the question for us is - how do we ensure that this person becomes impartial and independent, that we are talking about. And therefor those are the safeguards that we have to talk about. It becomes important that one of those areas then, it becomes important to look at a method of appointment of the person. That is the first one.

The second thing that we have to do, you look how that person is brought to account. So you have this checks and balances. Yes, he must take this discretion, but he must know that he has to answer - he is responsible for them. There is somebody else or there is a body of person's to which we have to account. Therefore you strengthen the accountability aspect. To guide against those things.

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You don't say those things are not going to happen, because they are going to happen. But what do you do to protect yourself from this? And I think those are the things that I would have expect us to talk about and not to deny the fact that these things are not going to happen, because they are going to happen.

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But how then are we going to ensure that we bring them to a minimum - to ensure that the office is not abused, because it is capable of abuse - it may be abused. And no-one can say today, end - I mean we will be lying if we say that this is not possible that the Attorney Generals are going to abuse us (inaudible) ... it has happened in the past, it may happen in the future.

But how do we put that ourselves, all of us against him when we need to do that. So, I think that maybe we could spend a lot of time at least some time talking about this question of seeing how is this person accountable to Parliament. Because we want to be able to look into that. And the method of appointment. To ensure that at least you don't just appoint - you get up and tomorrow, Willie, because he has conducted himself very well, today, is appointed to be the Attorney General.

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UNKNOWN:

But chairman, the appointment of such a man where is he going? What's the idea? Is he going to be a member of the cabinet. Or is he going - he is not going to be involved in any way, whatsoever with the executives. Is that - is that

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correct?

UNKNOWN: I think our proposal is that there should be a Director of Public Prosecutions who's not a politician in Parliament or on the Cabinet or in any way. It is the same as the existing Attorney's General. Except that they would - it would be a national office instead of 7 provincial offices.

UNKNOWN: Well I think, we must now perhaps get some drafts one draft reflecting our point of view basically and another draft reflecting the ANC's position.

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UNKNOWN: Just perhaps for clarity you say there be one office now instead of 7 provincial offices, do you mean that it's all going to be centralised or what do you mean?

UNKNOWN: Well I think the exact details of how it is structured, I don't think we should deal with in the Constitution. And I think the Constitution should simply say that, as it says at the moment, that it vests in the office of the Attorney General.

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But I think - you know and I don't think we have clear

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thoughts on that. We certainly would like to have people who are Attorney's General and in charge of each of the Provinces as they are chief control prosecutors and in charge of each of the courts.

And obviously each of them operate with some independence, but subject to some supervision. But, I think our view is that should - a prosecuting arms should be a national structure as justice as a whole - is a national structure.

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UNKNOWN:

Chair can I just sort of (inaudible) ... it seems that - I mean why I try to introduce the debate in the way I did and eventually (inaudible) ... very unsuccessfully that in some ways the - there are two concerns that have passed each other.

From what Willie's articulated there is a major concern for this national co-ordination on the - from the NP and DP positions the concern is of the AG becoming a vertically political ... (intervention)

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UNKNOWN: Or being manipulable by the Minister of Justice to the extend (inaudible) ... directing from (inaudible) ...

UNKNOWN: And the point is, those positions aren't mutually exclusive. It seems there are a lot of arguments - unanswerable arguments for why something national is required. It seems then that, provided that you can build in this type of safeguards, you can prevent the type of political manipulations, both concerns can be (inaudible) ... and that there is no - there is express opposition to the national idea - provided it is accompanied by safeguards. And it seems you know if there is going to be a basis for consensus. It's in that direction. 10

UNKNOWN: The thing is this I mean to talk about co-ordination, is wrong. That's not the intention. The intention is, management, supervision ... (intervention)

UNKNOWN: Direction.

UNKNOWN: Direction. So, there is no question about it. This is a super AG. He is not there to influence or to co-ordinate. He is 20

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there to take the last responsibility. And to make the last decisions.

UNKNOWN: Would you have objections then if he is there to coordinate, to influence ... (intervention)

UNKNOWN: That's a different - that's a different story - that's a different story.

UNKNOWN: I am raising that.

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UNKNOWN: That is what the Minister of Justice can at this stage do. I mean he can get - call them all in - say, look, Attorney General A has made this decision - Attorney General B has made that decision. Attorney General C has made that decision - how the hell do you want this country to go forward if there are three directions.

Let's talk about it and let's us get some direction together.

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UNKNOWN: Yes.

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UNKNOWN: But he cannot say look you do this or you do that or you go and do that.

UNKNOWN: Wait a minute - this (inaudible) ... he calls them in he says alright, this is what is happening. Now, we have got to get this country moving in one direction. And the other one says 'h-'n I stick to my decision. The other one says - I stick to my decision.

UNKNOWN: Right, let us take it to court then. Then the Minister takes it to the Appellant division and say right, I want a clarity order on this. Is this a criminal thing or not?

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UNKNOWN: Or we legislate.

UNKNOWN: Ja we legislate (inaudible) ...

UNKNOWN: Let's just take this debate further - there is one point - there is a ... (intervention)

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UNKNOWN: (inaudible) ... sorry you wanted to - no I wanted to say for example I mean in the way in which Danie was saying, he

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himself agrees that there is a need for co-ordination. He agrees with that.

UNKNOWN: Well let me talk - let me give you an example.

UNKNOWN: No I am saying, let's look at those functions which bother you in the office. And remove those functions which bother you if we can agree with that.

UNKNOWN: I am not (inaudible) ...

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UNKNOWN: For instead of us saying, no let's not want this position. Let's look at what it is that is acceptable to you. You have this office, you don't like to be a super AG, agreed I don't want a super AG myself. But what sort of functions give you problems with (inaudible) ... in your office and then let's define those functions.

UNKNOWN: Now the fact that he can (inaudible) ... that he can overrule Attorney General. I think that's the major thing. You remove that - we may be able to talk - we may be able to talk.

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UNKNOWN:

You know we have a public protector, a national public protector and we have got public protectors in all the other Provinces. No-one said, no, we should not have - we should not have this public protector nationally. We should just have all this 7 or 9 public protectors. Nobody has said - has suggested that. Nobody has also not suggested because I think there are correlations between what we have agreed to about the structure of protecting the structuring and the Attorney General.

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There is a correlation there and I really - - I really have difficulty.

UNKNOWN:

You see I - the main argument - the main argument facing me and is the fact facing us, is the fact - is the argument of uniformity of policy. I am not convinced that necessarily is a good thing.

There may be problems in Natal Kwa Zulu which is serious - let us take rabies, rabies is a main problem sometimes in Kwa Zulu Natal. And there needs to be very strong action against people who don't act against (inaudible) ... dogs

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and so forth and so forth.

But that's not a problem in Western Cape. You don't need the same kind of strong action here. There are many, I am sure there are many other examples. So, I am not convinced, that, on major issues, on issues of national importance, yes, sure, and then they can be brought before Parliament.

If they don't confirm, if they don't conform and they could be get rid of if need be, why not? Surely if a matter is taken to the appeal court, and a appeal court makes a decision and the Attorney General refuses to act in accordance to that guideline and decision, he can - he got rid of.

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UNKNOWN:

I think Danie, the courts have - as far as I know, in most of the democratic world are very reluctant to intervene with the decisions of the Attorney's General. If the Attorney General says I am not prosecuting the courts - go on second guess. They no where in the world do the courts overrule the decisions of the Attorney Generals.

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UNKNOWN: (inaudible) ... don't want the super Attorney General to
(inaudible) ...

UNKNOWN: No we - no we would like to have one Attorney General for
the country so that there is a uniformity at least in how
those decisions are taken. So that you don't have the
example that Paul mentioned, that in Transvaal miners can
be killed with impunity and nobody is prosecuted for it,
because the local Attorney General doesn't think it is a
really serious matter.

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Whereas in the Free State you may have an Attorney
General who thinks it's a serious matter and takes
everybody to court. Surely our citizens are entitled to an
equal dispensation before the law.

And how do you ensure that when you have given Attorney
General the power simply to say no. I refuse and there is
nothing that can be done about it.

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UNKNOWN: You take the outbreak of rabies in Natal. And there is a
outbreak as a result of that in the Eastern Cape, and Natal

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being prosecuted and in the Eastern Cape they are not prosecuted. So the people of Natal are more protected than those of the Eastern Cape.

You can't have (inaudible) ...

UNKNOWN: But they need more protection.

UNKNOWN: They always did.

UNKNOWN: (inaudible) ...

UNKNOWN: Can I just raise - what I think is quite a interesting - a point that doesn't seem to be made, is this - is a comment by four prosecutors, De Vries, Henning, De Beer and Stander. And the one point they make is accountability of the Attorney General has to be separated in principle - between policy in the exercising of his discretion in specific cases.

And it seems that it is something we haven't picked up in the debate. That the relationship isn't just a uniform one. That there are the big issues of the day on which there

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should be a national policy and which there will be. But that doesn't mean that you have to prescribe the right of the individual Attorney General's - how they decide in each case.

Now I think it is a mistake to see for instance that the courts could supervise this, because the point of the matter is a small percentage of crimes committed are ever prosecuted. You know we are all doing little things that could be prosecuted.

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And many crimes are overlooked and that is the area. But I think it is worth debating this type of distinction that they have brought out between you know the exercise in specific cases and principle - and sort of what they call, policy or policy and the exercise of discretion in specific cases. Because it may be, that in that area you can accommodate your fears.

UNKNOWN:

Are you referring to the last paragraph on page 1 of the (inaudible) ...

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UNKNOWN: By just looking at the summary ... (intervention)

UNKNOWN: The paragraph - last paragraph on page 1 is significant - Attorney General - Attorney's General of the respected areas of jurisdiction must remain there independent - must pertain their independence. Director should not be able to interfere with a judicial (inaudible) ... function but should have the power to give instructions to the Attorney's General to look after matters of national Provinces.

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UNKNOWN: H'm and then they - they try and I think specify how that distinction can be you know - they try and give further clarity to that distinction in the middle of page 2.

UNKNOWN: (inaudible) ...

UNKNOWN: (inaudible) ... that it's clearly in the national interest if he - the national person is saying bail is - people being released on bail is (inaudible) ... I wanted you to oppose bail or request (inaudible) ... bail in all people charged with a certain category of offenses.

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That would be a illegitimate matter for the national person to do. If then in a particular case the local Attorney General decides that all though this person falls within the category I believe that he is no risk to the public, I will not oppose bail, (inaudible) ... bail (inaudible) ... that basis.

He - he is entitled to do that. But in general terms he has got to apply that policy and then applies considerations (inaudible) ... reasons you know - but in strict terms he is not following it back of the illegitimate.

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But I think that's the type of situation that's got be allowed for.

UNKNOWN:

But presuming that - that one (inaudible) ... something (inaudible) ... with these lines and we then look at the discretion of each of these guys have got. They've got to be accountable for someone, and they got a discretion and not accountable for (inaudible) ... and we surely maintain (inaudible) ... to Parliament.

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UNKNOWN:

Ja, I'd understand that they would have a level of

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accountability to the director. But that doesn't just mean that he can tell them how to make a decision.

UNKNOWN: So if they could be asked, please explain can't you please change your mind? They could be asked to please change their minds (inaudible) ...

UNKNOWN: (inaudible) ...

UNKNOWN: If you built in some - some Parliamentary accountability - 10
I am very keen on seeing that.

UNKNOWN: I don't think anyone (inaudible) ... the Parliamentary. I mean look the national office doesn't exclude Parliamentary accountability. But I think it may be appropriate - I mean I don't think it is workable for a - you know for a - 9 Attorney Generals trotting (inaudible) ... the Parliamentary committees. It could be simply justice (inaudible) ...

UNKNOWN: Would not even be able to see (inaudible) ... you'll have to 20
fight it and (inaudible) ...

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UNKNOWN: Ja but I want to hear the Attorney General in Natal. Why is there such a discrepancy -why is it taking so long to hear people? Why are they - why is it - why are there so many delays?

UNKNOWN: Why can't you prosecute - that's (inaudible) ...

UNKNOWN: That's why doesn't he moves his backside?

UNKNOWN: I really want to ... (intervention)

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UNKNOWN: And to expect a national guy to really take responsibility for Kwa Zulu Natal, is asking to much.

UNKNOWN: No but now ... (intervention)

UNKNOWN: What does he know about the - what does he know about the problems in (inaudible) ...

UNKNOWN: The worst problem (inaudible) ... if he - you know he comes and he - you know gives some explanation (inaudible) ... he um's and the r's and he talks about the

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difficulty in the court. And then he goes back to Durban or Pietermaritzburg.

The problem is he is not a policeman at the end of the day, it's an unreal thing, it's a form of accountability but it's not in a position to ultimately direct this person to you know speed up his prosecutions or hire more prosecutors or - and you know it seems that, that in fact - that argument is a very good argument for (inaudible) ... the international office.

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UNKNOWN:

Well that's a different argument. You are arguing for, and I have a lot of sympathy for that, and that is for - for - and that is why I mentioned that, at the outset, for a prosecuting arm. An independent prosecuting arm.

That is divorcing the whole prosecuting arm from the Ministry of Justice. Making them totally independent. Almost like the Judges where they do their own thing. They are under their own administration and so forth. Then they can do something. They can - they can - he can employ more prosecutors and so forth.

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And that is something different and I have got a lot of sympathy for that. And that is what they are. That is behind the whole argument of De Beer. The whole story behind them is that they want their own separate arm administration and so forth.

And there may be very good reasons for that.

UNKNOWN: Are they going to raise their taxes?

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UNKNOWN: Their?

UNKNOWN: They never going to be independent, in the sense that - you know, they decide how many prosecutors there are you know. In the - (inaudible) ... of relative consent ... (intervention)

UNKNOWN: Just for purposes of clarification, I am sure Danie really means that they are separate from the ordinary administration and Department of Justice. They have at least - the young guys came and told us that part of the problem is there prosecutors are on the staff of the

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magistrate's court.

And all though they really take direction from the Attorney General in fact, the magistrate - the control magistrate at their little magistrate's court shall then exercise as being (inaudible) ... every other thing. And - so they wanted to fall under a prosecuted arm.

UNKNOWN:

That - I don't think expected to be proud about - (inaudible) ...

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UNKNOWN:

But it doesn't seem to be - I mean - I think that is desirable, I don't think you know - it should not be the magistrate who determines of people in the prosecuting service behave - (inaudible) ... In other words why it should go to the AG and (inaudible) ...

That's not a constitutional matter. Except that they probably appears to be a violation in the - you know the judiciary isn't suppose to (inaudible) ... you see.

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UNKNOWN:

(inaudible) ...

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UNKNOWN:

You know what, I think let's go back and think a little bit about this things. And see if we can't talk to each other and talk to some more people. I think you would have guessed that we feel strongly on this question and we also take very strongly the concerns that you have raised.

And we take them seriously, but I don't - can't see how we can't meet each other. That's why I think therefor it's necessary that we should continue to talk about this. But I don't think we can do it today. I think today we have exhausted ourselves on the subject.

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I don't think Danie that we should go for drafting.

UNKNOWN:

Okay.

UNKNOWN:

Let me say way I am saying so because the draft is going to go the CC - the CC is going to refer it back to us. Final analysis, we must reach an agreement between ourselves or amongst ourselves. We have to reach this agreement on this issue and we can't run away from it that we are not far apart. But ... (intervention)

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UNKNOWN: If you reasonable we not ... (intervention)

UNKNOWN: There is an unwillingness on you to jump or to cross the
(inaudible) ...

UNKNOWN: Say it again.

UNKNOWN: Again.

UNKNOWN: I am sure that we will be able to resolve the traditional issue 10
in a very short debate of time. Because looking at our -
looking at our representations and our documentation and
so forth. We've only really got one representation of any
work I am sure you will be the first to consider that. Have
you got (inaudible) ...

UNKNOWN: (inaudible) ...

UNKNOWN: And that is, the National Parties proposal is very neat and 20
reasonable.

UNKNOWN: I am looking forward to deal in your proposal Danie will not

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be reasonable.

UNKNOWN: Ja.

UNKNOWN: (inaudible) ... if know that in all the years ... (intervention)

UNKNOWN: And have you got - have you got our (inaudible) ...

UNKNOWN: Perhaps it will be more attracted today then it was
yesterday.

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UNKNOWN: We not (inaudible) ...

UNKNOWN: 2nd of June.

UNKNOWN: Where is it?

UNKNOWN: Page 13003.

UNKNOWN: It is on - in the Volume 13.

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UNKNOWN: No it's actually in both Volumes. It is's in both - it's in

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Volume 13 and it's in Volume - and it's in Volume 12.

UNKNOWN: Oh! okay.

UNKNOWN: Why does the National Party get this preferential treatment from the administration (inaudible) ...

UNKNOWN: It's on page - because we make it ... (intervention)

UNKNOWN: More than they have been (inaudible) ...

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UNKNOWN: Where is the real proposal? Where is the real proposal that (inaudible) ...

UNKNOWN: The last page 13011. In other words we've got the - 13011. We've got the exact wording there and I can read it to you.

UNKNOWN: Read.

UNKNOWN: The customary legal systems shall be recognized and applied in all courts provided that it shall not be in conflict with Parliamentary or provincial act. With a Parliamentary or

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provincial act - or the principles of public or national policy
or national Governments.

It is accepted that the labola or (inaudible) ... systems are
not (inaudible) ... to the (inaudible) ... of the public policy
of national justice.

And then secondly, the court shall have a jurisdictional -
judicial discretion to decide which system of law shall be
applied in a particular case taking into account the cause of
the action and the intention of the parties and the
implication - implications of such application.

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Simple.

UNKNOWN: Now you've got this in inverted commas, where did you get
it from. I see there is no - there are no footnotes here.

UNKNOWN: No.

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UNKNOWN: No - no we (inaudible) ... it ourselves so ... (intervention)

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UNKNOWN: From what?

UNKNOWN: Took it from another document.

UNKNOWN: No Danie - Danie is a big chief sitting (inaudible) ...

UNKNOWN: It's a (inaudible) ... from Danie's own mind.

UNKNOWN: It more relays from Section 18(1) of the existing law but I think our perspective is this that do we need to spell out this level of detail in the Constitution. I mean surely the question of whether labola is or isn't contrary to natural justice and so on is something that is dealt with in legislation at the moment and can be dealt with in legislation.

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For instance ... (intervention)

UNKNOWN: I think labola must come into the Constitution, (inaudible)

...

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UNKNOWN: And it as well as whether the courts have a discretion to apply the law and so on that. I mean surely you know our

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proposal I think would be much shorter just to say - that the customary law ... (intervention)

UNKNOWN: Like common law ... (intervention)

UNKNOWN: Like - I mean just more or less to use the wording that is in that constitutional principle at the moment. Like common law shall be recognized and applied by courts subject to the Constitution and to legislation.

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UNKNOWN: But can't we extend this thing I mean. Isn't it a good idea that white men should pay labola?

UNKNOWN: Receive we pay ... (intervention)

UNKNOWN: Or that white woman should pay labola for us.

UNKNOWN: (inaudible) ... married (inaudible) ...

UNKNOWN: Now you can see who is in the majority in this - in this Theme Committee here, all of them jumped there.

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UNKNOWN: Why are the women so quite?

UNKNOWN: Did you pay labola?

UNKNOWN: (inaudible) ... you should of listened to her remark now.

UNKNOWN: Now didn't we also say on Section 181(1) (1) should be retained. And that says the (inaudible) ... party which observe the system of independent (inaudible) ... law and is recognised by law, immediately (inaudible) ... a member of this Constitution shall continue as such an authority and continue to exercise in the form of (inaudible) ...

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UNKNOWN: I can't imagine why to put this labola thing in.

UNKNOWN: (inaudible) ...

UNKNOWN: How can it possible be contrary to the principles of natural justice of public policy.

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UNKNOWN: The courts (inaudible) ...

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UNKNOWN: To marry?

UNKNOWN: To get married.

UNKNOWN: To get married you've got to pay a heard of cattle, is that - is that not to some extend a bit - doesn't it (inaudible) ... doesn't it undermine this sort of freedom to marrying and so forth.

UNKNOWN: No - no.

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UNKNOWN: You not entitled to marry my daughter.

UNKNOWN: Does it not limit marriage to those with a lot of cattle?

UNKNOWN: (inaudible) ... no to young people concerned as to ignore the parents and go ahead and marry the (inaudible) ...

UNKNOWN: But can I try and focus our discretion a little bit if we may. It seems to me that on this side of the table there was a fair amount of consensus around a fairly brief statement but almost just re-statement of the constitutional principle.

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And I think we raised that point yesterday. Danie, I think you guys wanted to go back and look and think about that.

But really, is this - you know I don't think this is the kind of level of detail ... (intervention)

UNKNOWN: But what is - what do you suggest shall we use (1) and just drop the reference to the "labola".

UNKNOWN: No.

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UNKNOWN: I think we - I mean our proposal which is essentially just to re-state that second sentence in principle 13.1. Which is to say that ... (intervention)

UNKNOWN: (inaudible) ... law like common law shall be rectified and applied by the courts, subject to fundamental rights contained in the Constitution and to legislature dealing specifically (inaudible) ...

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UNKNOWN: That's right.

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UNKNOWN: Freedom Front formulation is more acceptable.

UNKNOWN: 13 which one?

UNKNOWN: 13.1 the second sentence.

UNKNOWN: 13.1 there isn't a second sentence there - second provisions -
the (inaudible) ... says a role of traditional leadership
according to (inaudible) ... law ... (intervention)

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UNKNOWN: Constitutional principles 13.

UNKNOWN: Op bladsy wat?

UNKNOWN: (inaudible) ...

UNKNOWN: Oh! (inaudible) ... law, sorry.

UNKNOWN: Ja.

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UNKNOWN: Waar is dit?

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UNKNOWN: It's at the back of the Constitution on these new one, page 194. That it's exactly what Rosier was reading now. Vryheidsfront is baie original in hulle formulاسie.

UNKNOWN: It (inaudible) ... inverted commas.

UNKNOWN: Ja it seems to be a very good formulation, I think I wrote it.

UNKNOWN: Baie geluk Danie.

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UNKNOWN: (inaudible) ...

UNKNOWN: Ja, except that I'd like to refer to it as customary legal systems.

UNKNOWN: But I think we want to distinguish between the courts on the one hand and the indigenous law and I think there is a need to distinguish between that, because indigenous law may be applied in any court of the country. But I think we need - may need to say something separate about traditional court. I am not sure that we should combine the two issues.

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UNKNOWN: Well the statement if we just amend that statement to say customary legal systems, like common law shall be recognized and applied by all courts subject to so and so and so.

That deals with the recognition of customary law.

UNKNOWN: Shall be applied by all courts, including the highly (inaudible) ... court?

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UNKNOWN: The labour court.

UNKNOWN: And that's the case. That of course is (inaudible) ... that is the court case at this stage. I mean indigoes law and customary law can - should - shall be applied in all courts at this stage.

UNKNOWN: Subject to regulation by law.

UNKNOWN: But the problem is whether you can - can common law be applied in customary courts?

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UNKNOWN: (inaudible) ... dealt with ... (intervention)

UNKNOWN: Fighting - (inaudible) ... fighting about.

UNKNOWN: I don't (inaudible) ...

UNKNOWN: Danie, can we just agree on the first point and that is to deal - it seems to me as if we have got consensus on indigenous law. And that consensus seems to be more or less a restatement of what is in that second sentence of 13.1.

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I mean whether we use indigenous customaries, legal systems or what ever.

UNKNOWN: Customary legal systems that's just a guideline.

UNKNOWN: Or whatever, but my worry about using that -those words would be that they would conflate a legal system includes courts and law. And I think that we should deal with those two things separately.

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I mean it doesn't make sense to say a legal system as

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applied by the courts and to say a legal system like common law, because it's - the one refers to courts and law and the other one refers to law only.

UNKNOWN: You see the (inaudible) ... fact is that if you've got several customary legal systems in this country. Not only one.

UNKNOWN: Yes, but when you say ... (intervention)

UNKNOWN: But - but Danie ... (intervention)

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UNKNOWN: Just a minute (inaudible) ... but when you say indigenous law you are not saying no I am talking about the Zulu law, the (inaudible) ... law. You are referring to all those systems all in it's - it's all inclusive (inaudible) ...

UNKNOWN: Praat jy (inaudible) ... alle uitheemse reg, gemeente reg.

UNKNOWN: All systems of indigenous law whatever.

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UNKNOWN: My - my law is just as indigenous as that law.

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UNKNOWN: But can I just suggest ... (intervention)

UNKNOWN: I've been a hell of a long time here to make this my law
(inaudible) ...

UNKNOWN: No but your law is called common law. But can we just
suggest that - I think - I think we've got agreement on that
aspect and we don't need to fight about the exact wording.
And I think that to some extent we can ask our advisors
and others to draft the words and make sure that they mean
what we want to mean.

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But can we then move on to the question of courts, rather
than law.

Now we did have some preliminary discussion on this aspect
yesterday. I think again, Danie wanted to go back and look
at it.

UNKNOWN: All right now that - that was our proposal was that it would
affect the Section 118(1) at this stage, 181(1)(1).

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UNKNOWN: So what you saying about courts Danie?

UNKNOWN: That we saying that Section 181(1)(1) is what we - we propose that, that be retained. We can argue about the - about the words as it (inaudible) ... but I think we'll have to say something say look we can't just stop traditional courts. I mean they've got to be recognised.

UNKNOWN: Danie did you speak to the (inaudible) ... before you made this (inaudible) ...

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UNKNOWN: No.

UNKNOWN: As the (inaudible) ... you didn't?

UNKNOWN: No, they've got to follow the (inaudible) ... surely ... (intervention)

UNKNOWN: But the problem is how do we know (inaudible) ... if you don't carry your (inaudible) ...

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UNKNOWN: (inaudible) ... matter of submission on that.

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UNKNOWN: Are they - (inaudible) ... they (inaudible) ... let me have a look at that. Might have (inaudible) ... one (inaudible) ...

UNKNOWN: But you - you say yes the traditional courts must remain. But they should not be able to - a person should be subject to voluntary (inaudible) ... subjection or whatever.

UNKNOWN: Ja.

UNKNOWN: So is that not (inaudible) ... the case? Do you not say, look 10
I refuse to be subject to your court, bugger you.

UNKNOWN: No and then you think you clever, and we teach you a few manners.

UNKNOWN: I think - if they use that ... (intervention)

UNKNOWN: And then your rights - and then you will have to (inaudible) ... it. Ja then there will be sentences and they'll execute, carry out the sentence (inaudible) ... difficult, so that's not 20
the case, no.

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UNKNOWN: And they'll sent you into a second initiation school.

UNKNOWN: So (inaudible) ...

UNKNOWN: I had a meeting in Tugela - public meeting and there were a number of IFP supporters there. And they said it is wonderful to be (inaudible) ... not where you - where you can attend voluntary.

UNKNOWN: That must have been a few (inaudible) ... you had there, it wasn't a big (inaudible) ...

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UNKNOWN: But also I don't know how we going to (inaudible) ...

UNKNOWN: (inaudible) ... dis nie die kwessie wat Danie na verwys nie.

UNKNOWN: Chairperson, I don't know how I am going to deal with this - in this package that we have receive there is a letter from Mr Hartwaddle and Juan (inaudible) ... it starts off - it says:

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My wife and I, being God fearing Christians have great concerns about the things that we are doing here. And

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therefore they would like to make the following suggestions.

When it comes to the Constitution, in this -the Constitution must require that the compilation of judicial bodies must reflect the principles of proportional representation. Particularly with respects to religion and gender.

Now when it comes to the - this chief court how do you ensure that both these things are respected.

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UNKNOWN: Religion and gender?

UNKNOWN: I just want to take into account what this gentlemen said.

UNKNOWN: But subject to nominations as well so that's (inaudible) ... one here.

UNKNOWN: And one and cheeky.

UNKNOWN: And it's subject to the fundamental principles, anything they do.

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UNKNOWN: Is there any difference between us on this -on this issues of these courts? And my party could not go along with the thing where woman for example are treated in a way that isn't consistent with their rights in term of the Bill of Rights.

If they wish to subject themselves to that sort of thing, well then they welcome to do so provided they understand what they doing and that in the powers to be able to refuse. Apart from that they can go ahead

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UNKNOWN: We - I thought yesterday we were almost agreed except that Danie wanted to go back and look at is ... (intervention)

UNKNOWN: Ja, I am not - you know I'd like to get expert opinions on the implications of that - of that being voluntarily - of the fact that you've got a voluntary submission.

UNKNOWN: And we not - we not experts on this - in this field, we'd like - I think we must get expert advice on it.

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UNKNOWN: But Danie are you suppose saying that people should be compelled to subject themselves?

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UNKNOWN: Well you know - I don't know, you've got a choice in the way that I understand it. I am not an expert.

UNKNOWN: If you saying well you have a choice anyway then what is your problem?

UNKNOWN: I just want to release myself from a crime.

UNKNOWN: Sorry?

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UNKNOWN: I can release myself from a crime. I can say bugger you I am not - I don't regard myself as a member of this tribe any more. Sadly I'll then loose my right to occupy the land.

UNKNOWN: (inaudible) ...

UNKNOWN: But whatever - and then - but then I'll also not be subject to their - to their support. So I - but I think that's - it's a fairly, I'd like to get expert advice on it, and I think you must put down exactly what you want - what you want in.

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UNKNOWN: But Danie, I think from our side, we don't want again to get

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bogged down in detail in the Constitution. I think in the Constitution we would just like the principle that whatever legislation regulates or deals with, it must include that an idea of voluntary participation.

So the only, I mean apart from a kind of recognition sentence, the most we would like to add is to say that participation and courts - such courts, shall be voluntary or something to that affect.

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UNKNOWN: All right but we must (inaudible) ... experts advice on that, on the implications of that.

UNKNOWN: But Danie, we've have been talking to this experts ever since.

UNKNOWN: The past six months.

UNKNOWN: We've been talking they've been coming ... (intervention)

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UNKNOWN: But not on this aspect, it's the first time that I hear ... (intervention)

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UNKNOWN: No,

UNKNOWN: No it's not the first time.

UNKNOWN: (inaudible) ...

UNKNOWN: It is not the first time, when Ntuli Madonsana was here Danie, she spoke on this question, she spoke on this question and she was ... (intervention)

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UNKNOWN: And we had a long discussion on it.

UNKNOWN: She was feeling very-very strongly on the matter.

UNKNOWN: Was she speaking on your behalf?

UNKNOWN: No she is one of the experts.

UNKNOWN: Oh! - it's the first time I ever hear that you were so up and strong on this since yesterday.

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UNKNOWN: Not me - I am saying she was, not me.

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UNKNOWN: No you corrected me there.

UNKNOWN: No - you not (inaudible) ... strong on this matter, we just saying on the basis of the inputs we have received we think the ideas she put across is a good one.

UNKNOWN: Theme Committee 2 didn't they - or aren't they dealing with this - with the traditional leaders (inaudible) ...

UNKNOWN: You see I think the difficulty is, that I am sure it's an implication of indigenous law, or customary law whatever. But that the members of this tribe are subject to this customary court.

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Now you underlining that specific aspect. I don't (inaudible) ... - you know I ... (intervention)

UNKNOWN: But Danie, it's the implications of customary courts - that people can be whipped and beaten and whatever else and we saying there is a bill of right now that lays down - I mean their courts are going to have to change. They are going to be subject to the Bill of Rights as well.

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UNKNOWN: Oh! that's something totally different I mean that - in any case that law is subject to the Constitution. That we've already agreed on. So they can't just do what they want. But I mean the ... (intervention)

UNKNOWN: But the point here is the question of jurisdiction, that's the point.

UNKNOWN: Would you want Danie to be - to - let's just talk about (inaudible) ... would you want to cover under the juristic 10 (inaudible) ... against your (inaudible) ...

UNKNOWN: I want to hear expert evidence on it, that's all I want to hear.

UNKNOWN: So I hear that.

UNKNOWN: I may not be in disagreement with you. I would just like to hear the experts on it. And tell us what is the implications of that. Is it not the present case. I have got great 20 sympathy for your view ... (intervention)

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UNKNOWN: I am not sure.

UNKNOWN: Ja I have got great sympathy for you view, but I think we must just get expert advice on that, that's all I am interested in. Unless you can show me something.

UNKNOWN: You want expert advice Danie or do you want time to go back and consider this, to go (inaudible) ...

UNKNOWN: No after - after I got expert advice, I will then object but I 10
can't consult without - without knowing exactly what the implications are.

UNKNOWN: Doesn't the National Party have it's own experts?

UNKNOWN: Yes - yes very much so. We can - I can get the - I can get experts advisors..

UNKNOWN: But Danie - Danie I think the problem here is that I don't 20
think that any - the constitutional court if we make these courts proper and compulsory courts - I very much doubt that they are going to last. I think the constitutional court

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will throw them out on the basis that they are not independent or impartial or that people are getting a fair hearing or what ever.

I think the only basis under which they can survive is that their participation and then like with the community courts that we are talking about, is on a voluntary basis. And we are not proposing that the Constitution should spell out the details of that. Simply that it should make it clear.

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UNKNOWN:

But if we bring in that qualification, our statement with regard to indigenous law will also law indigenous law also deals will also (inaudible) ... limited in that respect. Because it's indigenous law deals also with - with law of jurisdiction.

UNKNOWN:

And would we make indigenous law subject to the Bill of Rights in the Constitution.

UNKNOWN:

And to regulation by normal legislation.

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UNKNOWN:

Ja, okay but that's not good enough.

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UNKNOWN: And legislation can say whether their jurisdiction is greater or lesser.

UNKNOWN: Why don't we formulate the clause - I mean we seem to be - apart from Danie wanting to just check out the jurisdictional aspect. Why don't we formulate the wording and just note - minute the thing here that the NP wants to consult about the jurisdiction question.

UNKNOWN: Okay.

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UNKNOWN: (inaudible) ... of the jurisdictions question.

UNKNOWN: Can we proceed on that basis Danie?

UNKNOWN: Ja.

UNKNOWN: Okay, so we not to call the experts to come and talk to us on this issue.

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UNKNOWN: No I will consult my experts.

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UNKNOWN: No that's fine and you can consult the CA experts also.

UNKNOWN: And I'll be back on Thursday to say whether I need further advice. But this is a major thing I mean we've got major - we've had major representations from traditional authorities and traditional leaders and so forth. We can't just do something without getting proper advice.

UNKNOWN: Most of them belong to the ANC actually.

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UNKNOWN: Oh! but the difficulty is, according to the ANC's own submissions, and I would red in my face if I had to submit such submission. They say that this is - there is so much contention within the ANC - they don't to - they don't know what to propose.

UNKNOWN: No, we've had the opportunity to consult now with the other - with the traditional leaders and others and we - we feel that everybody can agree on that formulation.

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UNKNOWN: There is no odd thing about it, that he who should plays the piper calls the tune.

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UNKNOWN: But maybe Danie wants to recruit some IFP chiefs in town.

UNKNOWN: But let's get the wording, now are you going to talk to our experts about getting wording. Is there anything else we need to deal with?

UNKNOWN: And you don't - you don't have a wording in mind.

UNKNOWN: No we had principles in mind, now the experts must draft.

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UNKNOWN: When are we getting it?

UNKNOWN: The experts.

UNKNOWN: Pardon.

UNKNOWN: I can let them do it tonight, I'll phone them as soon (inaudible) ...

UNKNOWN: I think that in principle we don't have a problem with 181(1) as it stands. I am sure that it can be made a lot shorter than it is at the moment. And that one then adds a

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principle of voluntary participation with the National Parties reservation.

UNKNOWN: Well 181(1) doesn't really - I mean it belongs at 181. We - we need to extract the bit about the court.

UNKNOWN: I think we need to look at option 3. But not as it is. I think we need to work around that option.

UNKNOWN: Which option?

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UNKNOWN: Option 3 of the experts. Which is the one that closely comes that - I mean comes closer to ... (intervention)

UNKNOWN: What is it - can you read.

UNKNOWN: Notwithstanding the provisions in Section X and Y. X and Y prefer to provision dealing with the independence and impartiality of the judiciary. A traditional courts in a community which subscribes to (inaudible) ... law. And according to the will of such community, shall be recognized as such. Provided this is a language consistent with equal

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access to an equitable legal process regardless of gender and
bla, bla, bla.

But I am saying, that needs to be worked out, because here
it subscribes, it subjects people to the will of the
communities as such.

UNKNOWN: Not the individual body.

UNKNOWN: Yes not to the individual body. So if they can work around 10
this formulation and we beginning to adopt that.

UNKNOWN: The wording - you see if I - if we just put this Province here,
I am allocated a piece of land by the chief.

UNKNOWN: Good.

UNKNOWN: Just if they now ... (intervention)

UNKNOWN: Example from your own history, ja Danie. 20

UNKNOWN: Ja, well from my ambitions, similar (inaudible) ... But I am

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now accused of being guilty of witchcraft. And that is one of the three reasons why in terms of which they can now take away the land from me.

I am found guilty of witchcraft they can take away my land rights. Now they haul me before the court, say right your are a witch. And I say no bugger you I don't sit - I don't recognize this court any more. What happens to the land.

UNKNOWN: Well if you really - we really a witch you'd be (inaudible) 10
...

UNKNOWN: So can they now take me to the appeal court and say right -
we will take you to the appeal court and say you're a witch
there and you must - and take away the land.

UNKNOWN: If you were a witch you'd be able to make the court
disappear.

UNKNOWN: But also since you have are in Natal, you fortunate enough, 20
you won't be banned - you not in Transvaal they ban the
witches. So you won't have to worry about your land. You

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have to worry about life if you found guilty of witchcraft you see.

No I mean Danie - I think the difficulty that you having is whether people are entitled to enjoy benefits, from the system without the corresponding obligations. I think that essential is the point which you try to cover.

UNKNOWN:

It's not a good example but it's - let's take another example.

Also again the land but they - the tribes wants the land for certain - for certain reasons. And there again they can in terms of the law, they can now disposes you from that land.

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Now you say right - I am not recognizing your court.

UNKNOWN:

(inaudible) ...

UNKNOWN:

Pardon?

UNKNOWN:

No you can't you see those - it just can't be done. Now people have got the protection of the Bill of Rights.

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UNKNOWN: But Danie you confusing the forum in which it will be - will occur under legal systems.

UNKNOWN: Well that - that may be the case.

UNKNOWN: Ja.

UNKNOWN: That may be the case.

UNKNOWN: Your option may have be to move it up to a civil court. The civil court will have to apply the indigenous law subject to the Bill of Rights.

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UNKNOWN: And indigenous law can never say you a witch if you in the high court, unless you are.

UNKNOWN: But you'll like it there.

UNKNOWN: (inaudible) ... a witch.

UNKNOWN: Yes in Natal we don't burn our witches, we kill them.

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UNKNOWN: Are you seriously suggesting that if one - one decline to

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accept the jurisdiction of -of the tribal court as would be your right, that you would then forfeit your right of private land?

UNKNOWN: Ja.

UNKNOWN: Because if you would, then you got to change that.

UNKNOWN: No - no.

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UNKNOWN: I am sure that, that be the case.

UNKNOWN: If there are three reasons why land can be taken away from you in terms of indigenous law. The one is you're a witch, the second one is you are - you - the tribe needs the land. And the third one is, that you have - you have rejected the authorities of the tribe.

UNKNOWN: So then the exact equivalent would be if you were living in State subsidized accommodation in Khayelitsha and you wanted the court, the State - to court for oppressing your right and say okay, you take us to court to get out of our

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house in Khayelitsha. I mean ... (intervention)

UNKNOWN: That's just exactly the point.

UNKNOWN: It's unconscionable.

UNKNOWN: Yes, but also Danie, I think you fail to understand that, in terms of the Natal committee of all the places that is Kwa Zulu Natal, the indigenous law has been qualified in terms of the Natal code there is an appeal against the decision of the chief's court and the magistrate's court.

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Now once you appeal there, there no longer a apply there in those civil courts indigenous law or anything. Ten apply the common law, once you appeal.

UNKNOWN: No that is wrong.

UNKNOWN: We have got an Constitution that saying that you must (inaudible) ... must be applied.

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UNKNOWN: Okay but Danie, I think the point here is simply that those

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sort of details can be regulated by legislation. I think the -
and whether we want to allow the tribes to take away land
when people don't subject themselves to the court. I don't
think we want to allow that. But I don't think we have to
deal with that within the Constitution.

I think the Constitution will simply say that people
participate in these courts on a voluntary basis.

UNKNOWN: Have we got - have we got all the documentation on the - 10
on what we have said to us by the traditional people?

UNKNOWN: Yes.

UNKNOWN: Where is it?

UNKNOWN: In your bundle.

UNKNOWN: Where?

UNKNOWN: In your office.

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UNKNOWN: Somewhere.

UNKNOWN: It's here in the national (inaudible) ... of documents.

UNKNOWN: I mean when Holomisa and them went to Pedi, the people there in the rural areas, they didn't want traditional courts at all. They didn't want their own chiefs to have courts over them any more. And we got to cater for that and that's going to happen more and more.

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UNKNOWN: I am very aware of that.

UNKNOWN: There is no way we can force people into a system of traditional courts.

UNKNOWN: Okay let's - you provide us with drafts ... (intervention)

UNKNOWN: So we've got - we've got agreement.

UNKNOWN: No we haven't got agreement, I want expert advice.

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UNKNOWN: All right let's get it.

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UNKNOWN: All right let's get the advice.

UNKNOWN: Okay is there anything else that we need to deal with before ... (intervention)

UNKNOWN: That means we finish.

UNKNOWN: (inaudible) ...

UNKNOWN: I don't have to sit here for Huysamen, what is he going to tell us? 10

UNKNOWN: Sorry (inaudible) ...

UNKNOWN: What is Huysamen going to tell us?

UNKNOWN: I was wondering if we couldn't get some hot coffee. Is this too much to expect out of this vast gravy train in which we riding?

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UNKNOWN: With the President's advise.

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UNKNOWN: The coffee train.

UNKNOWN: I wonder if those (inaudible) ...

UNKNOWN: We want what's right.

UNKNOWN: (inaudible) ... problems in coming here now.

UNKNOWN: National aspects.

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UNKNOWN: We don't know - we don't know.

UNKNOWN: No I think our - just to actually ... (intervention)

UNKNOWN: Well maybe he should give us a quick briefing so that we
(inaudible) ...

UNKNOWN: It's the right question.

UNKNOWN: (inaudible) ... if you read the two provisions together where
this - where is the President's (inaudible) ...

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UNKNOWN: 88 somewhere.

UNKNOWN: I think it was (inaudible) ...

UNKNOWN: Time international agreements.

UNKNOWN: That's correct.

UNKNOWN: That's not a priority he can ... (intervention)

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UNKNOWN: But that was rectified by Parliament.

UNKNOWN: Yes, but now does it mean that in every time (inaudible) ...
Government is negotiating a international agreement which
happens ten times a week. The President has to be along,
that's you know there is a relative problem.

UNKNOWN: That is a - no but the ... (intervention)

UNKNOWN: Don't have clarity about the dedications.

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UNKNOWN: The Ministers who are acting, these are the Cabinet - the

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Cabinet Ministers they acting on behalf of him.

UNKNOWN: They not if you look at this, it's not ... (intervention)

UNKNOWN: Where is it, which page does it come?

UNKNOWN: From those piles.

UNKNOWN: Which page is it that you are looking first of all.

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UNKNOWN: It's page - it's actually (2)(1)(i) and then if you look at Parliament's pile - Parliament can be (inaudible) ... in a - it's supposed to look at every single international agreement that is negotiated and legislate on that.

Which again is not the position in most countries. Again because you see what the -one of the problems seems to be, that you don't distinguish between - for instance a major convention with the country a sense to ... (intervention)

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UNKNOWN: Sorry.

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UNKNOWN: Well it's - the concept of international agreements covers two things, they multi lateral conventions and then for instance if SAA signs an agreement with Air India, that also goes under the idea of an international agreement.

And it seems that in most countries you don't require you know most of the conventions were merely sort of - most agreements will merely take effect. And Parliament will - if Parliament wishes to repudiate that, it will do something. But you don't require Parliament to debate every single every Constitution - every what's it 231 is it.

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UNKNOWN: It's 231(2).

UNKNOWN: Where is this?

UNKNOWN: Doesn't it merely say that Parliament subject to this Constitution shall be competent to agree to the ratified.

UNKNOWN: Ja.

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UNKNOWN: Are you now with the national agreements?

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UNKNOWN: No we have to, if there - if there is an treaty, right it must be ratified of course.

UNKNOWN: Where does it say that.

UNKNOWN: I don't know I am just telling you what the practice is. Now I don't know I'll have to look into this. I know that for a fact.

UNKNOWN: You see (inaudible) ... where Parliament agrees (inaudible) 10
... in 231(3) - such treaties shall be binding. So what's the effect where there is not agreement (inaudible) ...

UNKNOWN: But there two only things that Parliament feel competent to ratify, so it has to ratify ... (intervention).

UNKNOWN: I always thought that was the purpose of that.

UNKNOWN: I don't think that's the right (inaudible) ...

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UNKNOWN: What are you seeing Willem.

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UNKNOWN: No as far as I understand, if the - if we entering to an international treaty, that does not become part of our law. And as far as I understood what 231 said, is that Parliament is competent of the ratifying (inaudible) ... If it does ratify then it is automatically (inaudible) ... But it doesn't have to ratify. It doesn't have to ratify for instance to exist.

UNKNOWN: And then what if - if it's not an agreement. It doesn't have to do - there can be an agreement but that agreement will not become part of our law, unless it has been ratified according to the Bill of Rights. (inaudible) ...

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UNKNOWN: No there is no need for our landing rights in Tokyo as far as our law is (inaudible) ...

UNKNOWN: No.

UNKNOWN: What is that?

UNKNOWN: And to the extent it is not binding on this Parliament or anybody else other than the parties to that agreement.

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UNKNOWN: As I understand it, it should be part of the law because of the act of (inaudible) ... ja ... (intervention)

UNKNOWN: Which - sorry which one?

UNKNOWN: Evert.

UNKNOWN: In agreement between SAA and Air India doesn't require the President does it?

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UNKNOWN: But at the moment formally it does other than that.

UNKNOWN: How.

UNKNOWN: The arguments at the moment - well because he - he has that power.

UNKNOWN: Yes.

UNKNOWN: Now he - he can mandate his powers I gather.

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UNKNOWN: No he can delegate those powers there is nothing that's

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stopping him.

UNKNOWN: He can't delegate them, I think there is ... (intervention)

UNKNOWN: No 82.

UNKNOWN: Is there a (inaudible) ...

UNKNOWN: I am not sure that I fully understand maybe let me just try
and - I am not following the track of the (inaudible) ...

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UNKNOWN: But if you - if you look through the (inaudible) ...
negotiating signed agreements.

UNKNOWN: International agreements, yes.

UNKNOWN: It's put into a very limited category of duties you know
which are - those that the President generally performs
himself. If you look at the rest of those duties. And that -
it seems that it's inappropriate that it should be classified as
one of those ... (intervention)

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UNKNOWN: But you do want the President to help this Parliament.

UNKNOWN: No generally it will be exercised by Ministers.

UNKNOWN: Ja but you do want the President also to have the power to enter into all those sorts of agreements. Do you want him to be able to help the (inaudible) ... with (inaudible) ... and talk and enter into binding agreements of the country.

UNKNOWN: Well ... (intervention)

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UNKNOWN: Sort of sales manager?

UNKNOWN: Ja and he'd had to be.

UNKNOWN: You can't - you have - you can't preclude the President from having such role.

UNKNOWN: Yes the point is, you've given that to him -you've given it - for instance you know the Minister of Finance, doesn't need the party convening in a meeting with the Cabinet. So you - it (inaudible) ... it (inaudible) ... in a category of

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powers which will lend those exercised exclusively by the President.

Whereas is one that is going to be exercised in part by the President and generally by - by other people.

UNKNOWN:

You see I am not (inaudible) ... to this, because I have been (inaudible) ... within this draft, probably (inaudible) ... to at the day and how it works that was - that was still (inaudible) ... undertaking is that the officials, the legal people in any department, usually go through certain international agreements and then they say okay this one is something that the Minister must look at.

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This one is something that the Cabinet must look at and then this one is something that the President must look at. And that is how they kind of distinguish between the different ... (intervention)

UNKNOWN:

Other way around.

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UNKNOWN:

And then they decide to which of these agreements are

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going to be - could be ratified. Just an observation. Maar ek weet nie wat die posisie is, what's the position concerning international convenance and agreements and conventions such as for instance the international - international labour organisation, (inaudible) ... in this regard?

UNKNOWN: Well there - there is quite you see because the problem is ... (intervention)

UNKNOWN: Hey is the man.

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UNKNOWN: The culprit is here, where is he going to sit.

UNKNOWN: We were waiting for you.

UNKNOWN: It's just (inaudible) ...

UNKNOWN: Gaan roep gou vir hom (onhoorbaar)

UNKNOWN: Hier is hy, try it (inaudible) ...

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UNKNOWN: All right - hi - hello how are you, well thanks.

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UNKNOWN: Let's waste no time.

UNKNOWN: Okay I think we should begin we not very clear on what you exactly have to say, so we are at the end of our other business any way. So we basically just going to hand the chair over to you.

UNKNOWN: All right thank you. I am actually addressing you because of the magnitude of the problem that I wish to address. I am I think (inaudible) ... my act as a legal advisor to the President and it's really in that capacity that I wish to address you. Under Section 82 of the Constitution, the President has accorded the right to negotiate and sign International agreements.

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I have had some express some concern - that I am not sure that the section is actually practically realizable. There is certainly a view in the State - Chief State Law advisors office in regard to other matters, that the President is not entitled to delegate his functions and powers as allocated in bi-section 82 because amongst other things there is a particular framework imposed upon the President in 82(1)

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(2) and (3).

Now, assuming that in a new Constitution, they would also be provisions which would set out what powers the President can exercise. I would urge strongly that in considering the question of the signing and negotiation of International treaties, provision should be made for the President to delegate those powers. That is consistent with at least the Vienna convention in signing of International agreements.

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Currently, we have adopted the view, as I say, despite my rather conservative views upon it, the Chief State Law Advisor and the Department of Foreign Affairs is happy that by virtue of customary International law, it has been possible for other persons to sign and negotiate International agreements. Provided certain conditions are met. There is a certain degree of ambiguity. I am not sure whether Foreign Affairs has addressed to on it. But there is wide spread concern that irrespective of the position now, that future Constitutions should make that section more workable.

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I just need to underline that by suggesting that International agreements are certainly - can be taken to include all exchanges of notes they - these take place daily - by lateral agreements, trade agreements, and in fact all communications between one State and another. It is patently impossible for the President even to sign all those agreements. In many cases the agreements are not signed in South Africa. They are agreements in respect of their traffic and agreements in respect of a host of very technical matters.

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And it is quite clear that Ministers of State and even public officials have to be mandated to sign those agreements and we need to make that clear as it is - as I've said, under the present Constitution by (inaudible) ... perhaps trained interpretation rely in 80(2)(d) I believe it is. it is 82((1)(d) and not in respect of any of the other powers of the President.

UNKNOWN:

Have you got specific wording in mind?

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UNKNOWN:

I think it will, to some extent, depend on how the general

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powers and functions of the President is set out. There may or may not be some framework upon the exercise of powers and functions of the President - there usually are, there usually is. A framework which will set out which decisions must be referred to cabinet and which must not and which belong as it were under the equivalent of his prerogative. There are some doubt as to whether the prerogative has survived this Constitution. But those powers which are equivalent to the Presidential prerogative, such as Parliament and so on are clearly not delegateable powers.

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So, to the extent that generally the powers conferred on the President are not delegateable. Specific provision must be made on regard to the International law treaties to allow that part to be delegated.

Now you may wish of course to consider the terms of the Vienna convention which makes it's own specific provisions around empowering officials to sign on the half of States. By enlarge gives a pretty broad right to do this to the Ministers of Foreign Affairs, provided they are duly accredited Ministers of Foreign Affairs.

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And then otherwise officials who bear what is called the full power - that is a expressed document - a document expressly authorizing them to sign that particular document. I don't know if there are any questions on that? There is another issue that I'd just like to raise with regard to International (inaudible) ...

UNKNOWN:

With regard to the Executive Deputy Presidents, do they have no specific authorities assuming they standing in for the President? Unless they have been officially appointed as acting President one way or the other of them?

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UNKNOWN:

Yes, you will note of course that (i) is covered by 82.(2)(e). This is quite specific to this Constitution. It should be noted of course that every document - that the President signs is counter signed by the Executive Deputy President. So further as some difficulties, you know we are often confronted at the Presidents office with the delegation down stairs from Taiwan or where ever. And they have arrive and Foreign Affairs has desperately got an agreement to us and we need to get the Deputy Presidents to sign and the one is in Taiwan and the other one is in Northern Transvaal.

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So, I am not sure that necessarily those problems will be duplicated in the new Constitution where we have multi signatures. In fact, there is no strict requirement that the Deputy President sign it's become a practice to signify that the consultation has taken place. Referred to in 82(2).

Now you are asking, apart from that particular arrangement - you asking, can't the Deputy Presidents be a sign that power. I think they can be and there is provision for the President to sign the Executive Deputy President such powers as he performs. I think it is in 84(5).

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But I am not sure that really helps you, because the nature as I've said of International agreements is that their fishing treaties which got to be signed by -and in just looking at the documents as they come to me, and I am obviously quite new to this, this field, it's very clear that you know it's the Minister of Fisheries and the Minister of Environment who signs at the International Environmental conference, the particular agreements.

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The Minister of Transport, who flies to India to sign an

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agreement of co-operation between Indian Airways and SAA and so on.

UNKNOWN: Do you interpret that, because it says the President shall be incompetent to exercising performed the following powers and functions start at 82(1).

UNKNOWN: It is exclusive.

UNKNOWN: That it is exclusive.

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UNKNOWN: It's the way we have interpreted it.

UNKNOWN: I think they (inaudible) ...

UNKNOWN: I you can I think and certainly we've adopted the view that it is possible for statutes to confirm a similar power on another official - for example, the Minister of Correctional Services has certain rights in Parliament. Conferred upon him by the act and he can release people early.

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UNKNOWN: Ja, but if you look at 81(1)(a) - there's got to be (inaudible)

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... context surely it's only Presidents who can (inaudible) ...

UNKNOWN: Ja, and I think you could - that is more or less I think true from all of them. It's conceivable that a statute could enable a particular Minister to appoint a commission of inquiry. But it's certainly not the case now.

UNKNOWN: You see let's just look at the wording there, is it possible - would it meet your concern if we add the following words to (i) to negotiate and sign International agreements or to mandate negotiation and signature of such international agreements. 10

UNKNOWN: It would certainly meet - that's exactly the kind of wording that I am looking for.

UNKNOWN: And is that not also very restrictive. I mean then he has to apply his mind to every ... (intervention)

UNKNOWN: Yes, that certainly - what is the situation now. And as difficult as that may be, at least it is physically possible. But I don't think when you are dealing with International 20

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agreements which are binding on the country, one can go to broad in granting a power to delegate. As I say - it seems from the Vienna convention that International practices to confer a quite a broad power without requiring a specific mandate from the Minister of Foreign Affairs. That is in the nature of Ministers of Foreign Affairs. But not on other persons.

UNKNOWN: Just to distinguish between sort of major treaties and other things.

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UNKNOWN: Can I come - let me come to the next point that I just want to address you on. Which has become a problem and Cabinet has had to wrestle with recently. And that is the question of the ratification. What does it all mean?

You've presumably been presented with some sort of scheme and the meaning of ratification and signing and the difference between signing and - shall I run through that?

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UNKNOWN: Yes please.

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UNKNOWN:

I prepared a memorandum for (inaudible) ... I am just not quite sure whether it's appropriate to - I might be able to give you a copy of it but it more or less sets out the scheme and the difference and what is envisaged by this section. Redworth's Section 231.

By enlarge the schemer for the adoption and ratification and otherwise bring into affective International agreements is as follows:

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International agreements by enlarge I have argued in this memorandum, to Council fall into two kinds. Those that require to be ratified and those that are brought into effect merely by signing. And generally that distinction appears from the document itself.

They fall by enlarge, not necessarily, but by enlarge, into two categories. Those where South Africa enters into an agreement with Mozambique on trade or what ever it is, is generally not a document that requires ratification. To be signed by one person, representing the one country and another person representing the other country. And that is

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generally the rule.

And in my view, those agreements become binding upon the country and that is also the view of the other players. Merely by virtue of proper compliance with 82(i). The President gives a mandate after he has seen the agreement, approves it - he says, we would like to enter this fishing agreement - fishing treaty with Mozambique.

However, generally in regarding to multi lateral conventions and again, this isn't an iron rule. There are bilateral agreements which require subsequent ratification. And they mention the word ratification. But mostly multi lateral agreements are arrived at by the following process.

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People will meet at a multi lateral or international convention. They will debate - that debate serves only to agree the text of the agreement and once the text is agreed, it is a adopted people put up their hands from the respective States and enough people agree - it is adopted.

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That adoption means very little. It means basically that the

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text has been agreed, the agreement itself has not coming into operation and nor is it binding. Most of those agreements then will specify that the agreement is open for signature. And in our case, because of 82(1)(2) it will have to be signed by the President or by somebody mandated by him.

But that signing means nothing. Well it doesn't mean nothing. It means that you basically like the agreement. You agreed to take it back to your country for consideration and for ratification. It - what is called it lies open for signature. And usually for a specified period.

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And the agreement itself normally doesn't come into operation. It has no legal status at all until a certain number of countries -had not merely signed it, but have ratified it. Now ratified it means something more.

What it actually means, of course will vary from country to country. Depending on how the countries themselves view or specify the formalities for ratification. In many countries of course, there is no difference between signing and

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ratification. The head of State does it and it has the same effect.

But most countries require that separate process of ratification generally involves, that it is adopted or put before its Parliament. And that by enlarge is why the United States has ratified so few agreements. Because the Senate in the United States has been enormously hostile to any notion of any agreement which tamper with their domestic law.

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Most of them are not quite so hostile in other countries, but it still requires a more formidable process. Because in the United States, Senators are required to ratify it. Now, in South Africa 231 requires Parliament to ratify it. And as you know, in ratifying it would both ratify it and it would indicate whether the law should become part of our domestic law. In other words, override our domestic provisions.

And there are also the other provisions, I am sure you are aware of. That the agreement may not conflict with the Constitution. And that's obviously to cater for the position

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where you adopt International agreement - affectively amending your Constitution without going through all the formalities. Which are normally required to amend your Constitution.

In other words, we cannot amend our Constitution by adopting a foreign agreement by ratifying an International agreement. Any way, the ratification process in short is the one that goes to Parliament. Now we have adopted that dual procedure.

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I think that personally my view is that, that is correct. International agreements which require ratification are generally multilateral conventions of a higher nature and they have more broader implications. And I think that the view that I am expressing, is that the Parliamentary role should be confined to those agreements which require ratification.

There was some confusion and there has been some confusion to whether ordinary agreements to require to be ratified by Parliament. In other words the first kind. The

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kind that the President signs. And I think that, that would be simply be impossible and impractical and it was never intended that Parliament should deal with individual fishing treaties, the basic agreements, very often between one department of State and it's corresponding department of State in another country.

So in short, what I am suggesting is that there should be I agree with by enlarge a process of Parliamentary ratification, but it should be confined to those documents which in the text specify ratification as a requirement. And those that merely indicate, or coming to being through a mere signature - should not have to go through a Parliamentary procedure.

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UNKNOWN:

Thank you are there any questions?

UNKNOWN:

Doesn't there appear to be a further problem created by cross reference that at the moment Parliaments rule is confined to those agreements that are negotiated and signed in terms of 82.(1)(i). Where as in fact it should be to all agreements which are capable of ratification. Because there

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may agreements that South Africa does not attend the International meeting. Where the agreement is negotiated. But may wish to ratify it.

It may be that - it got around by the term signed but it seems that it doesn't need to be confined to those that have been - (inaudible) ... the negotiation it could cover all of that.

UNKNOWN:

Ja.

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UNKNOWN:

It should also be mentioned of course that many of the agreements - ratification I should mention technically, as I understand it, really it is a term of art. And it generally means the process of adopting the Constitution, by those parties who were present at it's initial formulation. Whereas excision is generally what South Africa is facing. Excision is a party which comes along a couple of years later and wants to adopt it.

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In my view I am not quite sure if there is any agreement. I am not quite sure why there is a reference - in fact to

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section 82(1)(i). And the sentence could well read - if the reference 82(1)(i) was deleted, it would still have the same sense.

Oh! no wait maybe Paula - what we are suggesting is that the way it is formulated, if there is an agreement to which South Africa was not a party to negotiating to , it would - 82(2) 2312 wouldn't apply.

UNKNOWN: Well that's how it - it's possible but I mean there is certainly 10
is an ambiguity.

UNKNOWN: Ja then I have to agree, that's an invalid distinction. And if
there is a basis for Parliament to participate in the excision,
it' not affected by whether South Africa participate in the
negotiations or not.

UNKNOWN: Presumably one wants to keep the requirement that the
President should have signed the agreement at least or is
that not necessary? 20

UNKNOWN: Well in terms of the reform - what I have suggested by the

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reformulation of 82.(1)(i) he can of course mandate somebody else to sign it.

UNKNOWN: Ja.

UNKNOWN: But all I am saying is that one wants to keep in a requirement that the Government should have signed or that the agreement should have been signed before Parliament can decide to ratify it or otherwise.

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UNKNOWN: Ja you could, I haven't actually I am not trying to be too technical here, but quite frankly there seems to be as I have indicated, there are two meanings of signing. There is the one in 82(2)(i) which is generally the case where he signs and brings the operation to agreement and makes it binding on South Africa. And that looks like is what the reference in 231 is about. But in fact instruments which are ratified - when they are signed, it means something else completely differently. It means some formal intention to consider it. To consider the ratification.

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And you may want to clear up that ambiguity because

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signing is being used in two senses here. In fact, in some senses it is not necessary for an agreement to have been signed in that purely formal nominal sense at the ratification - I mean at the adoption stage. For it is subsequently to be subject to ratification. And maybe you should delete all reference to that signing.

UNKNOWN: What seems to be (inaudible) ... what actually the executive does to signify its accent and whether it has to be something (inaudible) ...

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UNKNOWN: It's accent in to which of the two?

UNKNOWN: Well assuming here for instance a multi (inaudible) ... with the bilateral you going to - you going to sign it and you know, and you'll take something with contractual (inaudible) ... as well. But with the multi lateral thing there may be no - I mean is there a need for instance if for instance an International labour organization convention who would vote for it?

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The obligation then on the Government is to place it before

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Parliament. Now according to - I am not sure whether it is appropriate therefore to acquire a executive consent as well or would the mere act of it approve of ratification by Parliament is sufficient. But the Constitution has to deal with that problem.

UNKNOWN:

No, but I understand in International law, that it is ratified in our case. Because this is what we require for ratification. It is that ratification by Parliament which incurs the obligations. The signing by the executive, does not incur the obligations.

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And of course there are - there is another reason why Parliament should exceed to these things. It is very often ratification, imposes quite - can impose quite severe physical burdens and enforcement machinery and reporting mechanisms have to be observed.

UNKNOWN:

I thought what Paul was getting at, was perhaps - I mean say we did not vote for an ILL convention and perhaps their executive is not so much in favour of it but can Parliament take it upon themselves to ratify it. I mean is there a

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requirement - or should there be a requirement that the executive brings it to Parliament or that it signals some sort of a assent.

UNKNOWN:

Well the way it works now is that Parliament is really dependent on the executive deciding and that is what the executive's role is. That it is an agreement worth entering into. I don't think Parliament can activate the process of putting the agreements for adoption before it and I am not sure that that's - that would be wise.

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UNKNOWN:

But I think in those cases the Constitutional International organization would oblige the executive to place it before Parliament. But there may be situations of a real conflict where Parliament may then adopt it. But I presume that - then it is the executive is overlooking that.

UNKNOWN:

I think that the signing, the technical meaning of the signing in those multi lateral conventions is, firstly as I understand it - you agree to put it before Parliament for adoption. That is the active signing. That is the executive commitment. If you don't sign it, then of course you're not obliged to put

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it before Parliament. All though you presumably could.

There is also an argument that during the period between signing and ratification, you shouldn't take steps in your domestic country to undermine the purposes of the convention. So it has that - cast that shadow over - there is another issue that comes up of course is what is the power of Parliament and the ratification.

And I just make the point, I suppose it is quite obvious. 10
But I don't think Parliament has the capacity to re-negotiate the agreement. I mean you must understand that the text has been adopted in a multi lateral forum and a portfolio, Foreign Affairs portfolio committee can't sit down now in all the portfolio committees in 20 countries and then try and re-negotiate it at long distance.

What they could do of course ... (intervention)

UNKNOWN:

Except the National Assembly justice committee.

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UNKNOWN:

What they could do of course, is to indicate which clauses

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they may wish to instruct the executive or indicate reservations. Which State parties can do of course. They can always adopt an agreement and indicate which clauses that they don't want. To which they will not be bound. And I suppose Parliament could have a role in indicating reservations.

UNKNOWN:

Is it possible at all for you to, or perhaps with the law advisors to give us some suggestive wordings? You know I think we could ask our own advisors to work on it. But they are probably much less in tune of what is required.

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UNKNOWN:

All right well I understand that the department of Foreign Affairs certainly being so concerned about some of the problems which have arisen from the current formulation that they were intending to put before the committee at least on a technical level, suggested ways which would smooth the operation.

And also more closely link this question between signing and the Parliamentary process more explicitly.

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UNKNOWN: I think (inaudible) ... have been occupied with those (inaudible) ...

UNKNOWN: But all I am asking is if I am not sure if you are in touch with them. But if from either them your advisor, yourselves if we can just get some agreed formulation, I think it would assist us.

UNKNOWN: There is just one other thing which I think you want to consider and that is, that I think you may want to explicitly require in the Constitution that when an International agreement is adopted or ratified, that it should be published in a Government Gazette. So that the people of the country know the International agreement which is now - to which the country is now signatory.

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And if it is adopted as a part of our domestic law and what needs to be stated here by adopting an International agreement as part of our domestic law, which Parliament is perfectly capable of doing through 231 or if there is a knock on clause in the new Constitution to the similar effect.

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Is it's adopting a law, having the force of statute without going through the normal statutory procedures. In other words there isn't any statute to eventually passed to which people can say - here is the law. But it is bounding on the country and on it's citizens and on the State. Without having gone through that process.

So I think where as this Constitution is silent upon that, I think it may be important to have - to explicitly required publication in the Government Gazette indicating also where the clauses, where there has been a reservation and indication which provisions have been made applicable on South Africa.

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UNKNOWN:

Any more questions? Thank you very much Mr Huysamen. I think we can now adjourn for the day. We are meeting again on Thursday afternoon. Subject to confirmation I think from ... (intervention)

UNKNOWN:

We've got just to finish the - now we basically (inaudible) ... nothing.

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UNKNOWN: We've agreed, we've made so much progress now how can you say (inaudible) ...

UNKNOWN: (inaudible) ...

UNKNOWN: What - we've agreed with this finished proposals subject to him presenting (inaudible) ...

UNKNOWN: Are we not meeting tomorrow at 2?

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UNKNOWN: No Thursday morning.

UNKNOWN: Well not Thursday I went to Robben Island on Thursday.

UNKNOWN: Are you swimming there or (inaudible) ... good.

UNKNOWN: Are we meeting what time is it at.

UNKNOWN: Afternoon.

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UNKNOWN: We had suggested that we meet in the afternoon and maybe we - I think we have - we have issues that we need to

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discuss and maybe we should make it definite that we meet at 2 or 1:30 you know when the Robben Island boat comes in.

UNKNOWN: Well that come - that's about around about 2.

UNKNOWN: (inaudible) ... just discuss next week.

UNKNOWN: Thursday.

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UNKNOWN: (inaudible) ... no next week Monday and Tuesday.

UNKNOWN: Shouldn't we discuss it on Thursday when we know what progress we've made.

UNKNOWN: No we ought to know it in advance.

UNKNOWN: Ja it's no good (inaudible) ...

UNKNOWN: I would like to know what are we dealing on next Monday.
What are we suppose to do on Monday.

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UNKNOWN: We are suppose to report back to the Theme Committee on the outstanding issues.

UNKNOWN: We are - and we are hoping to have a written report from our discussions ready to present to the Theme Committee on Monday, Tuesday.

UNKNOWN: Of these two issues?

UNKNOWN: On all the issues we've been talking about the last two days. 10

UNKNOWN: Also the correctional service thing as well - issue as well.

UNKNOWN: Okay.

UNKNOWN: When are we going there.

UNKNOWN: On Monday we'd agreed if that's suitable to them.

UNKNOWN: And what time? 20

UNKNOWN: What time are you suggesting, 10?

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UNKNOWN: But have we not set that date - that (inaudible) ... and how do these people know about it.

UNKNOWN: Well the meeting was set when - when we met last before we closed.

UNKNOWN: We were suppose to give the time.

UNKNOWN: But I think that we need to agree on the time and I think we need to make sure that everybody is informed in fact one of our committee members was rather cross with me today. She said she'd been phone at home and told to be here today for a meeting of our Theme Committee by the CA.

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UNKNOWN: They (inaudible) ...

UNKNOWN: The (inaudible) ... Tuesday.

UNKNOWN: I think we envisaged that the meeting may have to carry on till Tuesday.

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UNKNOWN: But can we just ask that the meeting on Tuesday starts also at ten o'clock because we have a Senate's groups meeting at

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half past eight.

UNKNOWN: That's true, thank you.

UNKNOWN: Then ten o'clock Monday morning.

UNKNOWN: Ten o'clock Monday and ten o'clock Tuesday.

UNKNOWN: If necessarily on Tuesday.

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UNKNOWN: Ja.

UNKNOWN: I think we - we agreed I mean I - I think it was set down somewhere that the meeting on Tuesday only starts at 10:30.

UNKNOWN: When is the CC?

UNKNOWN: Friday.

UNKNOWN: I have got it down for 10.30 on Tuesday.

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UNKNOWN: So we change to 10:30 on Tuesday.

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UNKNOWN: And what are we doing on Thursday and Friday?

UNKNOWN: Go home.

UNKNOWN: Report to the CC?

UNKNOWN: Is there a CC on Thursday?

UNKNOWN: Friday.

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UNKNOWN: Friday.

UNKNOWN: No - no the following week.

UNKNOWN: Friday also.

UNKNOWN: Just Friday's.

UNKNOWN: Now when are we getting this - the latest story on the draft
... (intervention)

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UNKNOWN: We are hoping to have that on Thursday afternoon, they
meeting on - tomorrow.

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UNKNOWN: They meeting tomorrow.

UNKNOWN: We have to wear Danie down slowly.

UNKNOWN: I just - on my side I would just like to (inaudible) ...
consideration for the fact that whether should - we should -
I don't know is there not a possibility that we can get the
correctional service people on Thursday?

UNKNOWN: No.

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UNKNOWN: Why?

UNKNOWN: They've agreed to let us have this thing in writing by
Thursday only. Now it's quite a big report (inaudible) ...

UNKNOWN: I mean it can't be a major issue. Can't we get them here
and why can't we hear - we've got to be here Monday,
Tuesday, Wednesday is women's day all over the country -
so we have to be elsewhere and then Thursday and Friday.

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UNKNOWN: No we not meeting on Thursday and Friday next week. We

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will be finished with ourselves.

UNKNOWN: Theme Committee will starve.

UNKNOWN: Theme Committee will be finishing it's work on Tuesday next week.

UNKNOWN: I will - I will suggest that we sit Thursday and Friday and we don't sit Monday and Tuesday how's that?

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UNKNOWN: I am just worried about the ... (intervention)

UNKNOWN: Friday is CC day.

UNKNOWN: But there also - we've send everybody back with the message that they are coming back on Monday, Tuesday so I'd be a bit worried if I change (inaudible) ...

UNKNOWN: If Parliament moves to Gauteng, we are going to (inaudible) ...

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MEMBERS ALL TOGETHER AT ONCE:

UNKNOWN: All right so when do we meet, Thursday at?

UNKNOWN: What time do we meet.

UNKNOWN: 2.

UNKNOWN: 2.

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UNKNOWN: Let's say quarter past two.

UNKNOWN: Quarter past two okay.

UNKNOWN: And now please can you or somebody (inaudible) ... the press (inaudible) ... to tell the press that we are not meeting all these other times and venues because nobody seems to have told them that.

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UNKNOWN: (inaudible) ...

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UNKNOWN:

No, but please I mean if - I have already told the press and we've got a list of meetings scheduled on that schedule and I do not ...

[END]

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THE CONSTITUTIONAL ASSEMBLY


THEME COMMITTEE 4

CORE GROUP MEETING:

1 JULY 1995

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TRANSCRIPTIONIST: L WOOD

..... 

EDITOR: H POTGIETER