

Excerpt from the Debate in the Negotiating Council, 29 July 1993:

Chairperson: ... Don't know whether the draft agenda that you have in front of you ... Alright, I see it has the report back from the planning committee. You have got the correct one in front of you ... then under item five, a report back from the planning committee on a number of items listed there. Then we go on to discuss constitutional issues where we left off yesterday, the eighth report, paragraph eight and further, and then we go on to the draft outline for the constitution, a general discussion on the various clauses and if time available we will go on to the fourth report, the outstanding constitutional principles, and then procedural administrative matters, and the meeting schedule. That is the draft agenda, is it approved.

Mr Rajbansi: Mr Chairman, just two points under item four. I note that we did not receive the minutes of one or two meetings of the planning committee, especially that of the 24 June, and under item number nine, could we have the draft meeting schedule from the 9 August, if it is available.

Chairman On the first the secretary informs me that the minutes have not been ratified yet and as soon as that takes place the planning committee minutes will then be circulated.

Mr Rajbansi Mr Chairman, we were told that the meeting of 24 June was ratified. 24 June is long ago.

Chairman Dr Jacobs

Dr Jacobs Mr Chairperson, it seems that Mr Rajbansi perhaps didn't receive them. They were distributed, and I will make sure that he has a copy.

Chairman Thank you, and would you also like to respond to the question concerning the meeting schedule?

Dr Jacobs It will be distributed in the course of the meeting.

Chairman Thank you. Can we approve the draft agenda? Thank you. Then we immediately go on to the minutes of the meeting of 21 July, that was

circulated yesterday. It is in your possession. I am going to deal with the correctness of the minutes first. We go through it page by page, and then we come back to deal with matters arising from the minutes. I put it to you, page one. Page two. Page three. Four. Five. Six. We turn to page seven. Page eight. Nine. Ten. Eleven. Page twelve. Thirteen. Fourteen. Page fifteen. Sixteen. Seventeen. And then page eighteen. Addendum A page 19 and 20. Addendum B, the draft programme and the other addendums. We have dealt with the correctness of the minutes. We will now deal with matters arising from the minutes. I will go fairly quickly, so if you have an issue on any particular page, please draw my attention to it. Pages one. Professor Rapinga.

Professor Rapinga

Chairperson, I suggest that we go to the minutes of the 26th and first do the adoption.

Chairperson

The minutes of the 26th are not in the agenda. Oh yes, sorry, thank you Professor Rapinga. Yes, we deal with that then. If you have the meeting of the 26th before you. Page 1, 2, page 3, 4, Addendum A, and the other addendums. Fine. Thank you, then we have dealt with both of them. Now matter arising from the minutes, we go back to the 21st. Page 1 to 5, anyone on the first five pages? Not. Page 5 to 10. Sorry. Professor Rapinga. Gentlemen, I am sure you know where you want to draw my attention.

Professor Rapinga

Chairperson, I am at 4.4. I have noted that 4.4.2 has been attended but I don't know whether

Chairperson

Oh, 4.4.2 on page 2.

Professor Rapinga

Yes. I just want to find out how to deal with that matter. The list has been circulated. At which stage are we going to approve or disapprove the submission.

Chairperson:

Dr Eloff.

Dr Eloff:

Chairperson, the decision was taken that the State would provide legal advisors for each committee, so it was people in their ex officio capacity, so there is no need for the council to ratify that, it was for your notification. That is why it was distributed

yesterday.

Chairperson: Satisfied? Thank you Dr Eloff. Page 3, 4, 5. Page 5 to 10. Anyone on any of those pages? Fine. Page 11, 12 to 20?

Unknown Unclear

Chairperson: [laughing] You have got to take a gap if you see one. Thank we have nothing further arising from the minutes of 21st July. Anyone who would like to raise any matter concerning the minutes of Monday 26th. Would you indicate the page and we will turn to that. If there is nothing arising, then we have agreed to that minutes as well. Thank you for your indulgence. Gentlemen, I will now ask the present Chairman of the planning committee under item 5 to report back to us on the matters listed under 1 to 5. Mr Cronje.

Mr Cronje Chairman, do you wish to deal with them one by one.

Chairperson: Please.

Mr Cronje: Chairman, in the first instance this council referred to the planning committee the whole question surrounding the TBVC states. And after giving it considered attention, the planning council came to the conclusion that you cannot really deal with the TBVC states in isolation and as an entity, without relating it to what is taking place in the council, and therefore determined that there is a close relationship on the issue of the TBVC state and the constitutional process, and decisions on the constitution. And therefore, in order to carry out the task assigned to it by this council and taking that into account, has decided to make the following submission for your consideration:

That an ad hoc committee on the TBVC states, consisting of 6 or 7 persons is established with the following terms of reference:

1. To discuss and make recommendations on the position of the TBVC states in relation to the drafting, and adopting of the constitution for the transitional period and in particular the timing when the decision on the reincorporation is necessary, and secondly to identify the

issues which must be addressed and to recommend a process and a mechanism to follow in the event of reincorporation being agreed.

Chairperson: Thank you Mr Cronje. Any comments? Dr Raja

Dr Raja: Mr Chairman, just a point of clarification here. When you state that the timing when a decision on the issue of reincorporation is necessary. May I get clarification? If the decision to reincorporate rests with the council, or does it rest with the TBVC states? What is understood when he said a decision on the issue or reincorporation is necessary?

Chairperson: I think that is something which the committee will further investigate, but at some time, taking the discussions in this council, a decision will be required. Even before the TECs for example, may be instituted. I think the discussion that took place here indicated that only when TBVC countries indicate their intention to become reincorporated, could perhaps their, and I don't say it firmly, but could their membership of the TEC be considered. These are issues that the committee will have to thrash out. And I think that is why the decision and the timing of such a decision becomes so important. Or is it after an election? These issues must be dealt with by the committee. I don't think we can discuss it here.

?? Chair, maybe I am not reading the issue correctly. I understood that the principle that the forum has adopted thus far, it is implied that the TBVC states will be incorporated into South Africa. And that decision, whether they want to be a part of the new South Africa or not rests entirely, because of the status, the independent status, rests entirely with the relevant governments.

Chairperson: Yes, but the decision of the governments, then, must be spelled out at a certain time, to slot in with other activities of the process. I think that is the intention. I don't know, Mr Cronje is not there, by that is my intention. There needs to be some process, and it is really concerning this process of reincorporation, when an indication is given of their reincorporation, technical, TECs coming into operation, and eventually the

processes that will lead up to full reincorporation. But those are difficult matters that will have to be thrashed out, and that is why it is the instruction to the committee to look into those matters and report back to the council.

?? You are exactly right. That is why we appointed the sub-committee chairperson.

Chairperson: Thank you Mr Cronje. Mr Kay Kelama, and then Mr Rajbansi.

Mr Kay Kelama: Mr Chairman, while we note the phraseology used in this resolution, I think it is quite necessary for us to dispel the notions that may be held by some of the members of the council here, that when it comes to the question of either reincorporation or whatever of Bophuthatswana that decision will be taken solely by the people of that country, and the issue of reincorporation into the present South Africa is totally out. It is not negotiable at all. The question of reincorporating into a unitary South Africa, that is not a negotiable point at all. I think we make it quite clear, even at the start of CODESA, that we will participate in the negotiations here, with a view to seeing whether it could be possible that Bophuthatswana could be part of a federal state, part of a region of a federal state, and also depending on what the provisions of the constitution are which would allow maximum autonomy of such a state. Only then Bophuthatswana can decide on its future.

Chairperson: Interrupt.

Mr Kay Kelama: If I could finish Mr Chairman. We don't want to leave any clear doubt in anybody's mind here that that situation is negotiable.

Chairperson: I didn't want to interrupt Mr Kay Kelama, but I am not going to allow a discussion now on the very issues that will be discussed in this committee. I put before you the proposal that an ad hoc committee be put together. The four TBVC states will be afforded all the opportunity also to convey their points of views to that committee, and the names will eventually be put before this council once recommendations have been made on them. Mr Rajbansi.

Mr Rajbansi:

Mr Chairman, while I to a large extent agree with the ruling, but the very deliberations of this council, in respect of matters that are on the agenda, are seriously affected on matters relating to incorporation of the TBVC states. Because the first sentence here, "to discuss and make recommendation on the position of these states in relation to the drafting and adoption of the constitution for the transition period. What we are doing this week, is that we are dealing with the drafting of this constitution for the transitional period. Therefore I want to suggest, Mr Chairman, that we appoint this ad hoc committee immediately and we need the report of this ad hoc committee also immediately because it has a serious impact on the workings of this council.

Chairperson:

It think it is almost impossible to appoint a committee and have their report. But I will ask Mr Cronje, perhaps it is possible?

Mr Cronje:

If the planning committee was charged to do it we would have done it yesterday, sir, but we were not. We have first got to get approval from this council. The planning committee cannot do things on its own, and in the course of today or the latest tomorrow we will put forward the names of a panel of people to do this work, and we will put it forward, but we couldn't do it before we had the approval of this council, because we are a sub-committee of this council. So I believe we have adequately dealt with the issue, sir.

Chairperson:

Mr Saloojee.

Mr Saloojee:

Mr Chairman, just as a point of information, the six or seven persons who would be on this committee, how would they be selected? One of the questions I would want to know that will there be at least one from the TBVC states?

Chairman:

Mr Saloojee, the names will be put before this council. The planning committee will make a recommendation to the council and certainly the composition will be carefully considered. I think it is obvious that the TBVC states will be afforded a proper opportunity to make their inputs. Whether all be present, or whatever form, but that will be considered by the planning committee and put before this council for full debate if necessary. Can we

then dispose of this and approve the appointment of such an ad hoc committee? Thank you. We have dealt with that. Mr Cronje, you can continue with the next.

Mr Cronje:

Chairman, it was brought to our attention this morning, and I believe that a press statement has been distributed among members, that in the Supreme Court of the Transvaal litigation is to be commenced with in respect of the issue of sufficient consensus rulings on two particular issues. My understanding is by the Kwa Zulu Government. We have been informed by the Sheriff of the court, here in Kempton Park, that it is his wish that summonses be served on the various parties or representatives of the 26 parties which are part of the process. I don't think that anyone should get over excited about it. The planning committee is giving attention on how that matter is to be dealt with and if there is any further information we will make that available to the council. Then it was thought that for other reasons the issue of sufficient consensus could be dealt with at a later stage and that we should give attention today to the issue of constitutional issues.

Chairperson:

Thank you Mr Cronje. That was more for information, the information of the council, not for debate. We continue then to 5.3, report of commissions of regions. Mr Cronje.

Mr Cronje:

Chairman, in this respect we have been informed, members of the council will recall that we decided that this commission will present its report at about 12 o'clock today. But we have been informed that because of certain difficulties, the commission is not quite ready to present its report, and we therefore believe we should enable them the opportunity to have a further meeting this evening. And if they could resolve the outstanding issue, they will submit that report to us and we will make arrangements for them to present that report, probably at the beginning of next week. But it will depend on the outcome of the meeting which will be held this evening.

Chairperson:

Thank you for that information. If there is no discussion, I thank Mr Cronje for the information passed on on behalf of the planning committee, that disposes of item 5.

I might as well inform you that the Technical Committee on Fundamental Rights' seventh report is presently being distributed. You will find that under item 8 of your draft agenda. So we are actually disposing of that as well. There is an embargo on it as you will note. This will be discussed tomorrow. So please prepare yourself on this report. I would like to draw your attention to the fact that it will be discussed tomorrow. We now return to the substantial issues and we take up the debate

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?? ... so much. But Dr Venter?

Dr Venter: Mr Chaskalson, who is going to

?? Mr Chairman, that is a matter that will be dealt with in the constitutional text as such, but the point is a valid one, namely that there can never be a situation where you don't really have a parliament. The fine tuning, the technical fine tuning of the formulations I would suggest is also something which should eventually be dealt with, the thing that is most important at this stage is the principles.

Chairman: Mr Alexander.

Mr Alexander: Mr Chairman, we would just want to hear in very clear terms, what is the duration of the parliament. When does it terminate in terms of various scenarios. If the constitutional text is not adopted in two years, in that scenario, what is the question of the duration of parliament, how does that affect the duration of parliament?

Chairman: Dr Venter

Dr Venter: Mr Chairman, the operative consideration is when a new constitutional text will be adopted and put into effect. That new constitutional text will determine what happens to parliament as elected in terms of this constitution. It would for example be possible for such a new constitutional text to provide in its transitional provisions that this elected parliament continues for another three or whatever years. As the parliament under the new constitution. Or it could provide for the election of a new parliament and then determine the point in time when this parliament ceases to exist. Exactly when such a new constitutional text will be adopted will depend on how expeditiously the constitution making goes, and that is where the deadlock breaking mechanisms also come in. There is another point there, Mr Chairman, I am sorry. It also possible, in terms of the deadlock breaking mechanisms, that a point may be reached where parliament must be dissolved and a new election be held. That is the meaning, partly, of the reference there to Chapter 5.

Chairman:

Thank you. Mr Alexander again.

Mr Alexander:

Mr Chairman, we would certainly want to have it very clearly stated in everything related to the parliament and to these transitional mechanisms we are putting in place, that these are transitional mechanisms, and there should be no indication of any permanence in its duration, by default or by direct action. It should not be stated or inferred in anything pertaining to this. For that reason we would like it to be clearly stated, Mr Chairman, that should we fail to get to the new constitution in two years time and you are forced in terms of the provisions of Chapter 5 to go for an election, that election should also apply to the parliament itself.

Chairman:

Thank you. The old Greek philosophers taught us that nothing is permanent. Three is not going to be discussed. Sub-clause 4 concerns the size of the National Assembly. Mr Rajbansi.

Mr Rajbansi:

According to the draft, Mr Chairman, the National Assembly will be elected on a national and regional party list. Now has the technical committee given thought as to what percentage will come from the national list and what percentage from the regional list, and the cutoff point, where a party has lower than 5% of the total votes cast will not have representation in the National Assembly, whether there is going to be different cutoff points for the national list and the regional lists.

Chairman:

Can I just remind you, Mr Rajbansi, of the debate yesterday, concerning regional and national lists and the reaction of the committee that they are not really responsible for dealing with electoral matters, that that is something that the IEC will have to deal with, although there is an overlapping area, and for that reason, they will meet with the Independent Electoral Committee to deal with those issues. But if they want to add something further, I will allow them an opportunity.

??

Mr Chairman, we have actually, and I said so yesterday, started discussing some of these details, but we are not ready to report on them. We hope to be in that position soon.

That takes us to - Mr Mentz, sorry.

Mr Mentz:

Mr Chairman, I am not going to argue the point. I am just going to indicate that in our view 400 members are too many. We say this because of the fact that even the present parliament, in our experience, is also too big. I am not going to argue the point, but we have in fact, and we handed in a draft constitution which we handed into the committee, in which we proposed that, and we ask that references should be made to that too.

Chairman:

Thank you. Mr Cronje.

Mr Cronje:

Mr Chairman, depending on how things are formulated, in terms of the instruction which we didn't formulate to the technical committee earlier on, on the question of SBRs, I would then assume that clause 1.1 of Chapter 4 will be reformulated to make provision for the ability of legislative powers at all three levels of government.

Chairman:

Yes we have passed that.

Mr Cronje:

As far as central government is concerned, that stands as it is.

Chairman:

Your point is taken there. Dr Venter.

Dr Venter:

Mr Chairman, I am not sure whether I understand the remark clearly, because Chapter 4 deals with the National Legislature.
[BREAK]

Chairman:

National Legislature, I presume, will be the body that passes the constitution and if there are to be three levels of government that will have legislative ability, then I presume that the constitution will have to make provision that the other two levels will also have it. So I am not dealing with the ability of the Central Government to do it. That obviously speaks for itself, or should that be accommodated elsewhere?

Mr Cronje:

Yes, Mr Chairman, we have other chapters later on as you will see.

Chairman:

Yes. Changing the constitution deals with that. We move on then, ladies and gentlemen, to the speaker of the National Assembly, 5, I

put 5.1, 5.2 and 5.3.

- Mrs Brink: Mr Chairperson, I know that it is not especially stipulated in clause 5 whether or not the speaker to be elected should be an elected member of the National Assembly. To my mind he or she should be an elected member of the National Assembly, and I would like the technical committee just to clarify on that.
- Chairman: Thank you, Mrs Brink. Mr Rajbansi.
- Mr Rajbansi: I feel that provision should be made for the election of a Deputy Speaker.
- Chairman: Dr Venter you indicated you wanted to react to Mrs Brink and also the question of a Deputy Speaker.
- Dr Venter: Mr Chairman, I think it is a valid point that the Speaker should be very clear, in constitutional terms, that the Speaker should be an elected member of the legislature, so it is a matter of fine-tuning eventually. The question such as the Deputy Speaker and many other details you will find that we will have to deal with later on. We have listed some of them on page 19 regarding the legislature, if it is not there, this may also be a matter to be added to that list in italics.
- Chairman: Thank you. Mr Alexander.
- Mr Alexander: Mr Chairman, when we started this multi-party negotiating process, we spent quite a lot of time debating and discussing the question of standing rules and all of this type of thing. Since we would like to see the National Assembly starting its function as soon as possible after it was put in place, I was wondering if we shouldn't maybe think in terms of, and I am speaking here under 5.3, asking the technical committee to give some thought to some of the rules and orders by which this Assembly will work and giving that Assembly itself the right to look at that and to review it here and there. I think that will facilitate its initial work, rather than to burden it with the task of spending a lot of time on the question of the rules and orders.
- Chairman: Rules and orders are normally drawn up by an assembly or a parliament itself. Dr Venter.

Dr Venter:

Yes that is the point I wanted to make Mr Chairman. I am not sure if Mr Alexander's suggestion is that it should be dealt with by the multi-party negotiating process, but 5.3 actually allows for the National Assembly to draft it in the normal way. And there are also other items related to this in the list on page 19 in italics.

Chairman:

Thank you. We continue then to the composition of the Senate. I put 6 subclause 1. Mr Meyer, and then Mr Eglin.

Mr Meyer:

Mr Chairman, I think it would not be appropriate now to try and change this, but I believe it would be important, after some further consideration in relation to other matters, that we in fact come back to the question of the number of representatives from each SBR in the Senate, and also on the question whether they should only be elected from amongst their own numbers. But I only raise it now, Mr Chairman, to indicate that I believe we should come to it at a later stage. I think now an amendment to propose.

Chairman:

Thank you. Mr Eglin.

Mr Eglin:

Yes. Mr Chairman, I am less concerned about the number, but just the phrase, "they should be elected from amongst its number", and then having been elected to the Senate, the person then has to resign from the Legislative Assembly of the SPR. And it seems to us to be odd that, in order to qualify to get to the National Senate, you first have to be elected to the regional legislature, and then you automatically have to resign from it in order to take your seat. It would also mean that the parties would be restricted in the people they send to the National Senate. They would restrict it to those people who opted to serve on the regional legislature. And we believe it would be far better if that, while the election takes place, via the members of the regional or SPR legislature, they should be free to choose whom they wish as candidates for the Senate.

Chairman:

Which might include members from the SPR government.

Mr Eglin:

Oh, Yes, it could. Anybody.

Chairperson: Fine, you have taken note of that technical committee. Mr Hendricks.

Mr Hendricks: Mr Chairman, I support what Mr Eglin has said. It is also our viewpoint that the members of the SPR in an electoral college should not be restricted to only having to elect from amongst their own.

Chairperson: Thank you. Mr Alexander.

Mr Alexander: I am just trying to hear what Mr Meyer is saying carefully, Mr Chairman. Mr Meyer says that there are certain points that could be raised. But we have no indication of his thinking. So how are we going to deal with what he says.

Chairperson: He is just giving notice that the numbers of ten could perhaps be revised and he is reserving the option for him to come back in the next draft and raise that again. You don't have to reserve your positions if you want to come back on other issues. Mr Rajbansi.

Mr Rajbansi: Mr Chairman, we go along with the suggestion made by Mr Eglin. I now refer to 6.3. That in the event of the senate being elected from the SPR legislature, we must be very clear that that vacancy shall be filled by persons whose names appear on the party list. I think we must be clear on the party list in order of preference. Not anyone below that list.

Chairperson: I think that again would be something that the electoral commission would have to consider. Mr Cronje.

Mr Cronje: Mr Chairman, surely the way a party list works, is that any party puts down its candidates in order of preference. If there are to be 50 candidates, you put down 50 names. And if there happens to be members from your party that become senators, then you replace them with the next names on your party list. That is the way it works.

Chairperson: We will deal again with lists and electoral procedures when we get to that. I think if there is on further comment on the composition of the Senate .. Mr Moosa.

Mr Moosa: Just a small point and that is under 6.1,

where it says that the senators will be elected at the first session of the SPR legislature. Perhaps in the fine-tuning, the technical committee should consider stipulating a time frame for that.

Chairperson: Thank you. Have we finished with 6.1, 2 and 3. We move then to the President of the Senate, 7.1, 2, 3. Mrs Brink.

Mrs Brink: Again, fine-tuning Mr Chairperson. I also note that it is not expressly stated whether the President of the Senate should be an elected member or not.

Chairperson: Thank you. No one else. Then on to immunities and privileges, clause 8. Mr Emlin.

Mr Emlin: Mr Chairman, I believe they should be regulated by law, but as I mentioned in discussion the eighth report, I believe there is a case when starting a new parliament, to actually define what those immunities and privileges are in the constitution, and thereafter how they should be regulated, leave that to the law enforcement.

Chairperson: Thank you. No one else on 8. Then we move on to rules and orders. I put clause 9.1, 2 and 3. Dr Venter.

Dr Venter: Mr Chairman, I just wanted some clarity on the remarks made by Mr Emlin. Is that the position of the council. Should we in other words plan to make provision for immunities and privileges in this constitution.

Chairperson: Yes. And how to change them. Mr Emlin, would you like to clarify your point.

Mr Emlin: Yes. Mr Chairman, I think it is absolutely critical in starting a new constitutional system, where we are not working on precedents or conventions, that the fundamental immunities and privileges of the highest legislature should be defined in the constitution itself. You may well have regulations as to how they can be amended, how they can be applied, but the essential immunities and privileges should be a part of the constitution.

Chairperson: Well, or the constitution could state that

they remain in force, they are normally in statute, that they remain in force unless they are in conflict with the constitution. But we leave that with the technical committee for the time being. Rules and orders, clause 9. No one on clause 9. Ordinary legislation. I put again 10. Mr Hendricks.

- Mr Hendricks: Thank you Mr Chairman. With specific regard to 10.2, it says that ordinary legislation may be introduced, but it doesn't state by whom it may be introduced. Are we limiting this to being introduced by government only, or will private members be allowed, or political parties be allowed to introduce legislation. And secondly, sir, we are of the opinion that ordinary legislation should need a simple majority to be passed in any one of the houses.
- Chairperson: First a question then an opinion. On the question Mr Chaskalson?
- Mr Chaskalson: I think we had contemplated that that would be the question of introduction of legislation would be something which would be addressed by the rules.
- Chairperson: Thank you. Dr Rajah.
- Dr Rajah: I also wanted to raise a question of majority. This clarification Mr Chairman, on 10.2, when you say by majority of the total number of members in both houses, is it implied that the houses sit together, or is intended to mean total number of members in each house?
- Chairperson: In each house. Yes, we confirm that it is in each house.
- Dr Rajah: And my I go on to 3? Mr Chairman, we would like clarification on 10.3, especially the last sentence when it says, "whereafter the bill shall be referred to a joint sitting of both houses for a decision by a majority of the total number of members of parliament." In other words, what is intended there is very different, and I want to just for clarity go back to page 18 on subsection 13, where it says, "a two thirds majority of the total numbers of members of the National Assembly and the Senate, sitting in a joint session." Is it intended to be a majority of the members sitting in a joint session, or is a majority

of the total number of people. To me there are differences in the concept ...

- Chairperson: I would imagine, sitting in a joint session, but, Dr Venter.
- Dr Venter: Mr Chairman, in the final stages of the preparation of this text we decided to make everything in the form of the total number of members. We may not have succeeded in picking up every point where that should have been done, but our intention was in all cases, a total number of the members of a house or both houses.
- Chairperson: Right. I have now Mev Kruger.
- Mev Kruger: Okay, Mr Chairman, I am also Mrs Kruger. On 10.1, I want to ask a question to the technical committee. It says there, "all laws except laws relating to finance, specified SPR matters," does that refer to the SPR constitutions in clause 10.1 on page 29 and further?
- Dr Venter: Mr Chairman, the intention is that that should refer to the following sections, sections 11 and 12, and 13.
- Chairperson: Thank you.
- Mr Rajbansi: Mr Chairman, I am still a bit not clear whether it is the total number of members of parliament, or total number of members sitting. Because total numbers of parliament will mean that even those that are absent will have their votes, they will be regarded as there. On the other hand if you have total number of members sitting ...
- Chairperson: That is right. That is what Dr Venter said. Total number sitting.
- Dr Venter: No, Mr Chairman, our intention is the total number of members. Those who are not there, who cant vote, are counted as no votes.
- Mr Rajbansi: No, but then Mr Chairman if you are talking about a majority, and if the house has got 400, and assuming you want a simple majority, then you need say 201. Assuming then that you do have in some session of parliament 201 members, or if the quorum is less than that, then we do not have the total number of

people. In other words, the vote of those members of parliament not sitting are also counted.

Chairperson: That is correct. That is what Dr Venter indicated. You will need the 201.

Dr Venter: Indeed, Mr Chairman, we thought it was a good idea if the members of parliament are forced to do their job.

LAUGHTER!

Chairperson: Mr Cronje. Oh, sorry, Mrs Mangope.

Mrs Mangope: My question has already been clarified.

Chairperson: Thank you. Mr Webb.

Mr Webb: I am also partially covered with a big blanket. Just an aside sir. If people are not there, they lose their vote. If one person counts the weight of two people, can he vote twice?

LAUGHTER!

Chairperson: You could have fooled me about covered.

Mr Webb: The point that I wanted to make was in section 10, where they refer to SPR, that of course could change, arising out of our discussions this morning, I guess.

Chairperson. Yes. Thank you. Mr Meyer.

Mr Meyer: Mr Chairman, in terms of 10.3, to me it seems to me the intention of the technical committee, and in a certain way probably repeating the same question that was put, but it seems to me to be the intention of 10.3 that it would be a joint sitting, and that the numbers there would be the total number of all members of parliament in that joint sitting, which would have the effect that the majority would then be the half of the total number of members of both houses, and not counted separately. If that is so, Mr Chairman, then obviously it would weaken the position of the senate as a factor in such a decision making process. I would just like to point this out because I believe, and I can understand the problem here, because it is also directed to be a problem or a dispute resolving mechanism.

But in view of the fact that the position of the Senate would then be a very weak one in such a case, I would suggest that we ask the technical committee to look into this and see whether there is not another mechanism to resolve this problem without having the negative effect about the position of the Senate in such a case.

Chairperson: Thank you. Mr Emlin.

Mr Emlin: Mr Chairman, the point raised by Mr Meyer, I would support him if this were a constitutional amendment, and you would therefore need approval of two houses separately. But this is really dealing with ordinary legislation, and I therefore think to have provision for a joint sitting and a majority of the total number, which is not as the majority of those present, but a majority of the total number of those two houses is a sufficient restriction. But I still have a problem with 10.2, in that respect. It seems to me that for ordinary legislation it is unusual to require a majority of the total number of members of the house. The normal way of dealing with normal legislation would say it should be passed by a majority of members in each of the houses. So that I can understand this idea of making MPs work, but to me it is extraordinary, and I know of no other precedent, where for ordinary legislation, you don't say a simple majority applies. But it has to be a majority of all the members even if half of them are absent. I believe that it actually places an undue restriction. It allows people to actually do their work by staying away. Because by not attending, you are just as effective in thwarting the will of parliament, as of attending. And indeed, if you really wanted to beat the ballot, you stay away because that will mean that the other side will not have a majority.

Chairman: I think we will ask the technical committee again to look at that aspect. Mr Slovo.

Mr Slovo: I speak in support of Mr Emlin's point. I don't want to repeat what he said, but on Mr Meyer's point, on 10.3, I fail to imagine what kind of other mechanism can be addressed by the technical committee, because once ordinary legislation is rejected by one of the houses,

the fact that they sit together won't make any difference. If you require a majority still, of each of the houses. It renders the whole clause irrelevant, and you are back where you started. Because we are assuming a situation where a bill say is passed by the lower house, it is rejected by the Senate, and then they sit together, and if you then still require a majority of senators sitting together with the National Assembly, there is no purpose in the whole exercise.

Chairperson:

Dr Venter.

Dr Venter:

Mr Chairman, there are indeed many alternative mechanisms depending on your wish to have two houses or chambers in parliament having an equal legislative status. One of the mechanisms that is sometimes used, especially in European parliaments is referral back and forth between the two houses, until such time as some kind of compromise is reached. That is one possibility. There are also other possibilities.

Chairperson:

Thank you. I think we have covered this aspect quite well. Mr Alexander.

Mr Alexander:

Yes, I would go along with Mr Venter is saying here if he were talking about a final constitution. But here you are talking about a transitional constitution, and we would like them to work as expeditiously as possible, not to have long proceedings of going back and forth in this particular instance. If our concern, coming back to Mr Meyer's point that was also partly raised by Mr Slovo, if our concern is the question of the representation of the regions and the views of the regions, then we must always bear in mind that we have a number of regional representatives in both houses. They are in fact the majority, Mr Slovo says, in the joint sitting. So we have to bear all these things in mind when we talk about these issues. Thank you.

Chairperson:

Mr Cronje, and then Mr Eglin.

Mr Cronje:

Mr Chairman, what Mr Alexander says is exactly the one point that concerns us. A constitution is a constitution. There is no permanent constitution. Whether it is transitional or not, you are still in the process of governing the country in terms of

that constitution. Once you do it in terms of accepted and adopted constitutional principles and procedures. It worries me a little bit if we say because it is a transitional constitution, therefore we don't have to follow the normal parliamentary mechanisms. One should, because at that point in time, whether it is a transition period or not, the country has to be governed in terms of that constitution. If we come to money matters, where money has to be allocated, we can't say it is a transitional period, it doesn't really matter how it is being done. I think it is important that it should be done. We do not make it unnecessarily complex, but one does do it in terms of normal constitutional parliamentary provisions.

Chairperson:

Mr Eglin.

Mr Eglin:

Mr Chairman, it is just to point out on this issue of legislation which might specifically affect SPRs. That is dealt with under clause 12, wherein that particular instance the Senate and the House of Assembly have to approve it separately, and if it affects a particular SPR, it has to have a majority of the senators of that particular SPR. I raise that because there is an extra protection for SPRs under clause 12, and should not be confused with the general powers under clause 8.

Chairperson:

Right, we take note of that. Can we dispose of clause 10? I am going to ask you to clause 11, but sub-clause for sub-clause. It concerns finance bills. Subclause 1.

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Chairperson, we had quite a lot of discussion on 10 and many suggestions, how are we disposing of it.

Chairperson:

Come again, Mr Moosa?

Mr Moosa:

How are we disposing of clause 10? What are we saying to the technical people?

Chairperson:

Yes. I think as we have indicated in the beginning, that this is not a discussion where we are trying to finalise matters and resolve issues. We explore it, we make comments, we ask questions, and we will deal with it more pertinently when it comes back in the next draft.

Mr Slovo:

I would like to place on record opposition to this concept presented by Dr Venter of a mechanism of going back and forth. I believe we should stick to this particular mechanism.

Chairperson:

Thank you. Dr Venter.

Dr Venter:

Mr Chairman, Mr Moosa's question I think is intended to help us, for which I am grateful. The point is that in these matters which sometimes deal with finer detail, if we are required to go back and come up with further formulation, it would really help us if we had a clearer idea of the general feeling of the council, otherwise we may come up with something in the alternative which will cause another part of this council opposing it.

Chairperson:

Right, Dr Venter, I think we will try and help you wherever possible, where there is some form of consensus emerging, I think in this case I think Mr Meyer referred to the role of the Senate in ordinary legislation, by and large the reaction of most of the members was not to be too concerned about the Senate since there are other measures protecting regions and that with ordinary legislation it may not be that important. I think that was the one outstanding issue. Mr Hendricks. Sorry, Mr Moosa.

Mr Moosa:

Chairperson, with your summary on that one I think that should be sufficient guidance to the technical committee, that 10.1 does cover the concerns of those who want to see a meaningful role for the Senate, especially as regards SPR matters and amendments to the constitution. The other matter was on the decision making. Whether it is a majority of those present, or a majority of the total number. I did get the distinct impression that what we are saying here is that it should be a majority of those present.

Chairperson:

They should review their position at the moment, and a majority of those present. We can always come back. I don't tie you. This is not decision making, ladies and gentlemen, I want to be quite clear. It is only to give some guidance to the technical committee and all the opportunity will be there for any delegation to raise these issues again when it comes back. So I am not tying anyone down to the interpretation I give it. It is just to

try and assist the technical committee. fine. With those few observations, can we then turn to 11.1. No problem with 11.1. 11.2, 11.3, 11.4. Mr Slovo and then Dr Rajab.

Mr Slovo:

Mr Chairperson, very briefly, in view of the urgency of appropriating revenue and moneys and so on, I believe the period of 30 days is too long. It should be 14 days for the delay mechanism.

Chairperson:

The period too long? Dr Rajab?

Dr Rajab:

On the same matter, Mr Chairman, lines 1, 2, 3, 4, it says, "the bill shall be reconsidered by the National Assembly." Could we get clarification on what it means? Does the National Assembly have not to retake the vote and legally now pass the bill again? Is that what is intended?

Chairperson:

I think that is what is intended, yes. The Senate serves here as a delaying mechanism. House of revision, but it is referred back then to the Senate as it was in the old parliament, when the Senate couldn't really always stop a bill, but it could refer it back for reconsideration. That is correct. Dr Venter?

Dr Rajab:

Mr Chairman, then the National Assembly has got to take the vote again on that bill?

Chairperson:

Yes.

Dr Rajab:

Could that be clarified then, that the bill should be passed by the National Assembly, or some words to that effect?

Dr Venter:

We will clarify it, Mr Chairman.

Chairperson:

Fine, looking at the wording. Mr Cronje?

Mr Cronje:

May I just ask in respect of clause 11.3, the Senate will be composed of members coming from the SPRs. The central government will be allocating the various equitable amounts to the various SPRs in terms of certain proposed criteria, and laid down rules and regulations. Shouldn't there in respect of that, bearing in mind that the Senate is composed of people from the SPRs, be some provision that in respect of these moneys, if there is a major difficulty, they should have a little bit more

say than they would normally in respect of other matters. It may be that they disagree with the way in which the National Assembly has allocated it. It may be that they disagree that they have not done it in terms of the laid down procedures or criteria.

Chairperson:

Thank you. Dr Rajab?

Dr Rajab:

Chairman, may I suggest another alternative if the bill fails to get the approval of the Senate, that the National Assembly merely refers that bill to the State President, rather than resitting and having to go through the motions of passing it.

Chairperson:

The object, and I think this has been the case and it is the case in most constitutions, where they have a system, is that the debate in the Senate may encourage some members of the assembly to reconsider their positions that they have taken up in the first vote.

Mr Rajab:

Mr Chairman, the Senate might debate certain amendments which can be then reconsidered by the Assembly.

Chairperson:

Right. Fine, we have dealt with the financial, money bills, 11, we go on to bills concerning specified SPR matters, 12.1 and 2. Mr Cronje.

Mr Cronje:

Could we just be informed as to exactly what this means in practical terms?

Chairperson:

Dr Venter would you elaborate a bit on clause 12.1 and 2?

Dr Venter:

Mr Chairman, let us take them one by one. Both concerning the exercise of powers and functions allocated to the SPR governments in the later chapter, shall be approved by the National Assembly and the Senate. In other words, if in the scheme of this draft outline, a thousand functions of SPR governments are dealt with in the legislation, both houses have to be involved. And 11.2 then says that the bill which affects the exercise of powers and functions allocated in terms of that chapter to a particular SPR only, shall require the approval also of a majority of the Senators coming from that particular SPR, when both houses deal with this matter.

?? May I just follow up and ask what does the involvement of both houses entail?

Dr Venter: Both houses should approve it, Mr Chairperson.

Chairperson: Mr Webb.

Mr Webb: The way I read it, sir, perhaps it can be clarified. In terms of Section 6.1 of Chapter 9, the National Executive, after consultation with each SPR executive, in receipt of recommendations. I don't want to debate the whole discussion this morning, but I would assume that arising out of our discussion this morning, and where the emphasis is to be placed, that this clause could be amended in the redrafting process. If it is not so, then I would like to address it. If it is so, I would like to leave it to the wisdom of the technical committee to consider.

Chairperson: Dr Venter.

Dr Venter: Mr Chairman, section 12 on page 18 works on the basis of an accomplished fact regarding the allocation of powers, whereas chapter 9, section 6 deals with the process of the allocation. In other words, the powers and functions dealt with in section 12 at that stage have already been clarified, ascertained, determined, proclaimed in terms of section 6 of the 9th chapter.

Chairperson: Thank you. Mr Rajbansi.

Mr Rajbansi: Mr Chairman, 12.2. If there is a disagreement between the legislature and the majority of the senators of a particular SPR, in the event of there being a disagreement, should there be a mechanism to deal with that disagreement or deadlock?

Dr Venter: Mr Chairman, I don't think it is a matter of principle, it is a pragmatistical matter. My personal opinion would be that that should be dealt with politically and not constitutionally, but there may be other views.

Chairperson: Mr Moseneke, please carry on.

Mr Moseneke: Mr Chairman, I want to add that there will therefore be no law which affects that SPR. That is the practical effect, until the

respective parties find some resolution.

Chairperson:

Thank you. Fine. Ladies and Gentlemen, can we then continue to amendments of the constitution, 13.1 and 2, again here we have the total number of members I am putting it to you whether in changing the constitution the original idea of the technical committee should not be retained as against what we have said when it comes to ordinary legislation. But I would like to hear your views. Mr Eglin.

Mr Eglin:

Mr Chairman, in this respect I believe it should be the total number of members of the two houses, and I would hope that with the friendly support of the ANC, they might agree to this being 70% and not 66 and two thirds. And so I put it forward for noting that we would prefer a 70% rather than a 66 and two thirds percentage. Mr Chairman, the second point I want to make is in relation to 13.2. It is suggested, I think, "no amendment of this constitution shall be permissible in so far as", not "it is designed to", it detracts directly or indirectly. It is not a question of whether it is designed to detract, it is a question of whether it does detract or not, and I would suggest the deletion of the word "is designed of" and it becomes the word, "detracts".

Chairperson:

Yes. Fine. Mr Moseneke.

Mr Moseneke:

Well, Chairperson, sometimes I think the debate that occurred in the technical committee was quite often a particular amendment may not detract from constitutional principles, but may clearly have an intention to avoid the full impact and implications of the constitution. So it is wider than .. Stated as it is, it was intended to go wider than merely detracting. It is sufficient if its intention is to avoid the consequences of the principles.

Chairperson:

The argument is that it is even stronger as it stands?

Mr Moseneke:

It is indeed wider than suggested by Mr Eglin.

Chairperson:

Mr Chaskalson.

Mr Chaskalson:

Yes, I think Mr Eglin should read it with

Clause 5 on page 22, which makes the constitutional principles unamendable. We were discussing the sort of situation which arose in the Senate case at the time of the voting disputes, where a technically correct method was found of getting around the entrenched provision, but it clearly had the intention of avoiding the entrenched provision. The Appellate Division, when it dealt with that, by 10 judges to 1, said that design was irrelevant, and this was merely just an additional safeguard to make sure that you couldn't, by fiddling around with the structures, achieve indirectly what you couldn't achieve directly. And the direct thing is actually prohibited by the section I referred to.

Chairperson: I am going to give Mr Eglin another chance. It is still on his point.

Mr Eglin: Mr Chairman, I am grateful at the concept that even if it is designed to, that is a factor. But let us presume that it isn't designed to, but in fact it does detract. Are you then limited to taking into account whether it was designed to detract, or whether in practice it detracts?

Chairperson: Mr Chaskalson.

Mr Chaskalson: If it detracts, it is prohibited under the clause that I referred to which makes the constitutional principles unamendable.

Chairperson: Right. Mrs Finnemore.

Mrs Finnemore: Mr Chairperson, 13.2, I want to raise a point of clarification regarding the applicability of constitutional principles to this transitional act. Now what I want to ask is this: this morning in the debate, I think it was Mr Mosenke who said that the constitutional principles did not necessarily apply in this transitional act. And I think Mr Venter also agreed. And yet in the fifth report, it says "The constitutional principles will bind the constitution making body established by the constitution for the transitional period, and should also be taken into account in drafting the transitional constitution." Now I just want some clarity on how these constitutional principles apply to this transitional constitution? Where do

they apply and where don't they apply? Because it is quite important for this regional powers debate.

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The one is binding, the other is embodying.

Chairperson:

Mr Chairman, my colleagues may want to add, but when we started working on this text, the first thing we did was to identify which of the principles have any bearing on the various parts of such a constitutional text. We consciously approached the matter in a way, taking cognisance of giving effect to using the constitutional principles as a guideline insofar as they could be made applicable, for this constitution for the period of transition. But there are principles, and some of them actually most of them in this category, have a bearing on the SPRs which cannot, for the transitional period ...