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TRANSCRIPTION OF THE NEGOTIATING COUNCIL MEETING HELD ON 14 SEPTEMBER ON CONSTITUTIONAL ISSUES

The 11th report of the technical committee on constitutional issues was presented by Mr Chaskalson and Dr Venter.

What follows are the discussions and debates which arose from this report.

Chairperson: Mrs Finnemore

We are now going to ask for questions of clarity, then we will go through the questions which have been put forward by the technical committee and then we must not forget that Mr Chaskalson has asked for instructions. Are there any points of clarity relating either to the 11th report or to the annexure thereto?

Mr Rajbansi: In connection with the head of state, the president shall be the head of state and in relation to clause 6 the committee indicated that the executive power shall be vested in the state president. The clarity I require is that in terms of what is proposed, is the president really the head of state or is he going to be a lame duck president dictated to by the political parties, that is my concern and secondly is the technical committee considering that an electoral college is proposed to be presided by the chief justice to elect the president wouldâ\200\231nt there be a need for election rules to be embodied in this constitution or alternatively as is contained in the present constitution, that this power be given to the chief justice to make the election rules, because these are necessary.

Dr Venter: Regarding the second question, we are working on the text of an annexure to the Constitution which will deal with the electoral process, if its decided that it should be done in that manner. Regarding the first question, we have indicated that our proposals are not hard and fast proposals, we would not like to be engaged in defending any specific element of it. What may be useful is to keep in mind that there is a distinction between an executive head of state and a head of state which handles functions of a formal, ceremonial nature for example as we had prior to 1983. One of the debating points which we have identified is whether the president should be an executive head of state and if so to what extent should such an executive head of state be limited by the rest of the executive and parliament in the choices and discretion exercised by such a person. Those are political questions which must be decided by the Negotiating Council. Our perception was that it would be difficult for this council at this stage to give us clear instruction on those matters and that should be probably dealt with outside this council.

Mr Mahlangu:

Chair:

Mr Landers:

Dr Venter:

Mr Hettasani

Dr Venter:

I want to ask, on the decision making, the suggestion of the technical committee in matters such as the budget and other matters which are not of high majority, the ordinary majority can be taken, and then a condition is placed that the president and deputy president should agree and if you look at the formulation where they say that the deputy president may belong to another party and the president to another. Are you not bringing some conflict where you have these two heads from different parties and there is a problem of ordinary majority, because both of them must consent. ’

Will that come up for discussion when we are discussing D?

My question deals with the executive power of the state president and his power over the armed forces, the statutory armed forces and whether 6 provides for this although its not stated. And even if it doesnâ\200\231t provide for this shouldâ\200\231nt there be a clause that he is in fact commander in chief of all armed forces.

This is something which can be dealt with in different ways. One way would be to deal with it in a chapter specifically devoted to the armed forces. The history of that kind of provision which we have in the 1983 constitution and previous SA constitutions is really a colonial one partly, being the commander in chief of the armed forces has been a royal prerogative in earlier days. It is also so in the USA. This is dealt

with by giving the president the status of the commander in chief when armed forces are committed in the war situation but is something which I donâ\200\231t personally consider to necessarily follow. It is something that has to be decided upon and should be part of the whole constitutional view of dealing with the armed forces in this constitution.

I have a question regarding the head of state where it is said that a procedure whereby the president is indirectly elected by the national legislature. What is meant by the national legislature. Earlier on Dr Venter used the word parliament and under parliament he was referring to the national assembly and the senate. Which is the correct term to be used.

In chapter 4 of the draft constitution, we have the idea of calling the national assembly and the senate jointly parliament for the purposes of ordinary legislation. Our problem was in 2, subsection 1 if the president is to be elected as soon as possible after the elections it may be difficult to include the senate into that electoral college because it would take longer for the senate to be composed via the SPR legislatures. In subsection 3 to which the question was directed, it is required that the president elected must be a member of the national assembly which is part of parliament, its just a way of putting it, but

it would be difficult to say parliament is there in general terms because parliament also consists of the senate and the senate may be composed

a bit later.

Mrs Jajula: My question is on the state president, the vice state president and the prime minister. What advantages

End of tape 1

TRANSCRIPTION ON THE DEBATE ON CONSTITUTIONAL ISSUES
IN THE NEGOTIATING COUNCIL
ON 14 SEPTEMBER 1993

CHAIRPERSON : MRS FINNEMORE

TAPE 2 SIDE 1

?

... the duties to the same people. I would like to get clarity as far as thatâ\200\231s con
cerned.

Chairperson
Would we not be dealing with that a bit later and later questions?
Dr Venter?

Probably yes Madam Chair, but allow me just one sentence. If we are contemplating a
multi-party government, it will probably be necessary to accommodate, for the purposes of
accommodating as many as possible of the different parties in Cabinet in an effective manne
r
to have different, not only portfolios, but specific functionaries in Cabinet. It should
naturally not be an illogical proliferation of functions, but that would be one reason for
having those different posts.

Chairperson

Right, I think to save Dr Venter, I think what he is saying is that the whole principle of
the
nature of the government of national unity what does it mean for the choices we have to
make regarding Cabinet decisions. Mrs Jajula, you want to come back.

Mrs Jajula

Yes I wanted to follow up Dr Venter who says it is not a matter of portfolios but itâ\200
\231s
accommodating the multi-party approach. But is it really worth it to have two State
Presidents, meanwhile we foresee having a Prime Minister and two State Presidents actually
running at an executive or whatever position and at the same time with the Cabinet with the
Prime Minister, which is coming out later on. Is it really worth it?

Dr Venter?

That really, Madam Chair, we do not want really to reply to because whether itâ\200\231s wo
rth it
to have a multi-party Cabinet or whether itâ\200\231s worth it to have different portfolios
 and whether
itâ\200\231s worth to have a variation of portfolios is something that must be developed po
litically.

Chairperson

Right, I think weâ\200\231ll come to that later in the debate as well. But thatâ\200\231s w
hat the debate is
about. So we have had a start to the debate. Can I call on Mr Desai.

Mr Desai

Just a question to the Technical Committee. I notice in the Twelfth Report that they come down heavily in favour of a Judicial Commission to appoint judges. If they ruled out completely a system whereby the President appoints the most senior judges in this country, and where they are then subjected to Parliamentary scrutiny. Thatâ\200\231s the first quest
ion. The
second question is the Technical Committee has not made any provision for the situation where war is declared. Who declares war on behalf of this country?

Advocate Moseneke?

Chairperson the Twelfth Report would canvass appointment of judges extensively and I propose that it be dealt with then, because we there again set out a whole number of option
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and before I keep quiet let me just re-emphasize to even the Eleventh Report, so too the Twelfth Report. We are creating no more than possible areas of debate. And we do not, in these particular chapters we have made no choices. What I have put up to you are no more than areas of debate and therefore it will be this Council that must make decisions in each case.

Chairperson
Right, thank you. Mr Cronje.
Mr Cronje

Madam Chair, regarding the second question I think we must also reply to that. The question of the declaration of war. We discussed this matter and one important view regarding the declaration of war is that it has become old fashioned to declare war. One simply makes war nowadays. But on the other hand itâ\200\231s not only that. War, the decla
ration
of war should normally or in an ordinary democracy be based on a broader consensus on such catastrophic kind of thing to do. And therefore Parliament should probably also be involved in that. Thereâ\200\231s also some history in South Africa which indicates that. B
ut the
˜ declaration of war as is the question of the, of Marshall Law, the declaration of Marshal
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Law, are things that come from the past that are very often such disastrous things to do th
at
it should involve more democratically elected people. And they are really old fashioned.

Chairperson

Professor Wiechers ... sorry, Professor Wiechers just indicated he wanted to also put an input and they I’ll give you a chance.

Professor Wiechers

Thank you Madam Chair, Honourable Members. There is a very strong feeling in the world today and I personally agree to that, that declaration of war is against International Law.

War is outlawed in International Law. What can happen is a declaration, something youâ\200\231ll
find in the Namibian Constitution. Declaration of a National State of Defence. Itâ\200\231s not just
playing with words. Itâ\200\231s defending your country. But declaration of war as such is against
International Law. Now, who would declare the State of National Defence. That too has
been pointed out two directions in Constitutional Law, one is the Executive Head, the
prerogative powers of a State, of a Head of State, the other tradition which is a very strong
tradition is, that it is declared by the representatives of the people through Parliament.

Chairperson
Mr Desai, do you still want a response.

Mr Desai

Yes, yes I am not being belligerent or bellicose. Now who declares a State of Defence then?
Surely this must be outlined in the Constitution. You canâ\200\231t just leave, you canâ\200\231t just ? on
this question. I know Law has been outlawed by the International Community, but more
people have died since World War II in unofficial wars, than in that war.

Professor Wiechers?

Well, Madam Chair the developments, especially since the Second World War, has been that
the whole matter of declaration of a State of Defence or exception and the whole question
of Marshall Law and so on, has developed into, into Security legislation. Now Security
legislation in South Africa has also got a particular accent. But itâ\200\231s quite constitutionally
acceptable I would say as it has actually been dealt with in the chapter on Fundamental
Rights to have very clear legislative regulation of security matters, including such as, such
matters as a declaration of a State of Exception.

Chairperson
Thank you, I now have Mr Cronje, followed by Dr Rajah and Mr Eglin. Mr Cronje.
Mr Cronje

If making war or declaring war is against International Law, we certainly living in a totally
lawless world. Because irrespective of whether you declare it, itâ\200\231s happening. And most of
the victims donâ\200\231t even know theyâ\200\231re in a war. They just happen to be victims. Thatâ\200\231s not
the point of my intervention. There is a suggestion that the State President gets elected as
a member of Parliament, or the potential State President. Once he is either directly or, well
indirectly elected, the State President, the possibility that he then vacates his seat and is
replaced by someone else from his party list. If he is no longer a member of Parliament and
if he is outside Parliament to attend to other executive matters and ceremonial matters, how
is he accountable to the people who actually elected him? One is normally accountable
through Parliament. Now there is a suggestion that there could be Prime Minister. But the
Prime Minister is a Prime Minister. Heâ\200\231s not the Head of State. How is the Head of State
accountable?

Chairperson
Righi, Dr Venter.
Dr Venter

I suggest that that should also be discussed under (c), Madam Chair. But just in general there is also provision in our tentative text of impeachment. .

Chairperson
Right, thank you, weâ\200\231ll leave that for section (c). Dr Rajah.
Dr Rajah

Chairperson, my query is with regard to section 9 on page 40/41 regarding the formulation of policy. And it says there the provisions must be made here for policy guidelines and directives. It also goes on to say that the Minister shall administer the policy in his own department. My question is, is the Minister also obliged through the concept of collective responsibility to adhere to the economic, or to the policies in other portfolios in which h is
party is not represented? Secondly, should the policy guidelines and directives be formulat ed
in consultation with all the Ministers, or with the Minister in charge only? And are the parties which form part of the multi-party Cabinet also shared a collective responsibility for
the policies in which their members are not represented? Secondly, on page 43 it mentions that the duties of Deputy President. I am wondering that in the absence, assuming that the President is out of the country, it does not make provision for the Deputy President to assume some of the responsibilities of the President in his absence.

Chairperson
Right, Dr Venter, a few questions there for you.

- Dr Venter

Madam Chair, all those questions I think we would also have, some of them we have already raised and some I think are useful to have been raised for discussion. :

Chairperson

Okay, so weâ\200\231ll come back to those during the discussion on the questions. Right. I now
have Mr Eglin.

Mr Eglin

Mr Chairman, the question I am going to raise is not one of great principle, but just a question that puzzles me. As Mr Cronje pointed out ...

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Your party member objects to your terminology.
Mr Eglin

Under the schedule, under the Annexure, upon being elected the President for the KT seat in Parliament. But nevertheless, in order to be elected to the Presidency, the Head of the Executive, heâ\200\231s first got to be elected to the Legislature. Now, why should he first have to be elected to the Legislature in order to be elected to the Executive. I raise this because I – am not aware of any other countries where this applies. It doesnâ\200\231t apply in South Africa now. And I am not aware of Executive Presidents first having to be elected to the Legislature in order to qualify as candidates for election to the Executive. Is there a hidden reason or an obvious reason of which I am not aware?

Professor Wiechers?

This matter really goes to the question of whether one should have a directly elected Head of State, or an indirectly elected Head of State. If you have an indirectly elected Head of State on a proportional list system, at least, at least the person who can be elected has some electoral legitimacy if he must first become a member of the Legislative Assembly. But to deal with it otherwise is going to make it difficult for parties I think. If they think that they, that their prime candidates will, or can be elected to the Presidency, they, and it is not required of them to put them on their lists, they make take such a chance of not having the leader of the party on the list and then eventually it appears that he or she is not elected. Thatâ\200\231s the difficulty. There may be more elegant ways to deal with it. But we haven â\200\231t really given much thought to that.

Advocate Chaskalson?

As a matter of interest, there is at least one other country in which this happens and that is in Namibia. The Namibian Constitution makes provision for the indirectly elected President out of the Assembly. There may be others as well.

Chairperson
Right, Mr Hettasani.
Mr Hettasani

Thank you, Madam Chair. My worry concerns subsection number 6 here. The President shall terminate the appointment, itâ\200\231s on page 42, the appointment of any Minister if requested to do so by the leader of the party from which such Minister was chosen. What I have in mind here is I am chosen by the leader of my party and when coming to Parliament I have perhaps a holistic view of the situation in South Africa and my party leader sees only that portion, or the region from which I come. Not long a conflict arises between me and him and he now tells the President that I should be fired and I am fired immediately. Because there is no procedure which I see here of whether this matter will first be entertained perhaps by the whole Cabinet or whatever. Itâ\200\231s just my party leader sending a fax message in the morning and says yesterday I saw this man, I heard this man was saying that the railway line

should pass via say Gazankulu. He has agreed that it should pass via Venda. And my party leader is annoyed about that and he simply, simplistically just say fire that man and I am fired. Is there no such, is there no other way in which this can be put in a better way, because otherwise there will be a lot of conflicts here.

Chairperson
Is there any help for Mr Hettasani there?
Advocate Moseneke?

The provision is a direct consequence of multi-party arrangements. A party would be entitled to a seat in the Cabinet, by virtue of the proportion of the seats it holds in the Assembly. And therefore that would not be, that would be a party representative who sits there. And presumably there would be a certain level of party democracy, which I think can be dealt with in the Constitution. So the point I am making is that would be an example of a multi-party Cabinet, which would therefore have members who really would see there by virtue of them being appointed by the party leader or in consultation with the party and th eir
termination would follow the same route.

Chairperson
Right, thank you. Mrs Diba.

Mrs Diba

Thank you Chairperson. May question relates to item 6 on page 30. Where it states that if the President withdraws from Parliament, the Prime Minister would provide the link between the Parliament and Executive. What Iâ\200\231d like to know is under what circumsta nces
would the State President withdraw from Parliament? What did you have in mind here? Impeachment or could I be clarified on that?

Dr Venter?

Well, Madam Chair, the office, any office can be vacated in various manners. He can resign, die, be impeached, I think those more or less cover it.

Advocate Chaskalson?

I think, also in that regard itâ\200\231s the model, makes provision for the President to w ithdraw.
In other words the President will not continue to remain in Parliament once elected to that office and will come to Parliament to deliver an address to Parliament when called upon to account for particular Acts by Parliament, but otherwise wonâ\200\231t attend Parliament an d so the
link between the President and Parliament will be the Prime Minister.

Chairperson

Right, thank you that seems to end the session on clarification. Professor Wiechers.
Professor Wiechers

Thank you, Madam Chair, Honourable Members. I just want to come back to Mr Eglinâ\200\231s point. Why have an electoral process for your Head of State. Well the principle there is, Madam Chair, do you want an elected Head of State? Now if you want an elected Head of State by the people itâ\200\231s got to go under this Constitution through the electoral pr ocesses and
the idea as we understood is very strongly that we want to have a Head of State, that he or she should be elected by the people.

Chairperson

May I thank you. I am sure we will come back to that point when weâ\200\231re discussing th e
questions. Right now if we can turn to the agenda and the questions to be debated thatâ\200 \231s
been set out, I suggest we take them point by point remembering that if we can get some consensus and give some instructions to further the work of the Technical Committee, we should do so. So if we can start with Question A – Should the President be an Executive Head of State. You will find the references in the Eleventh Report on page 28 and the references in the Annexure on page 38 and 39. Mr Eglin?

Mr Eglin
Mrs Chairman, to set the ball rolling, provided what is understood ...
Interruption from the floor

Point of order. Madam Chair, twice on two occasions Mr Eglin referred to you as Mr Chairman. –

Chairperson

The Mr Chairman is not complaining at this stage, letâ\200\231s just get on with the ...

Mr Eglin

Chairperson, provided that generic term of Executive President is prescribed in the Constitution and I think it is there under Section 6 defining the executive power in terms of
the Constitution, we have got no problem with this concept. But we have got reservations which I will state in respect of it which will be dealt with later, but I'll just identify them
now. We have a great concern that one person should be the Head of State, the Head of the Executive, the Head of the Party and also the Head of the Legislature. And if all of those were rolled into one we would have a great concern. So we will argue later on that when you come to the effective executive administration that that is in fact divided in the sens e
between the Head of the Executive, the State President and the Chairman of the Cabinet or the Chairperson of the Cabinet and the Prime Minister who will in sense head up the Executive on a day to day basis in his responsibility to Parliament. So we would argue strongly in favour of the concept of a Head of State Executive, but subject to the Prime

Ministerial concept of some of that executive responsibility taken over by the Prime Minister and also responsible to Parliament for it. And the third one Mr Chairman is that we would also support the view that the Head of the Executive, the head of State, should not also be the head of Parliament and in that sense he should vacate his seat in Parliament and somebody else should represent the Executive in Parliament, and not the head of State. So we support the concept of an Executive President, but we believe there should be done some dilution of his absolute power by means of the mechanisms which are implicit in the report of the Technical Committee.

Chairperson
Thank you Mr Eglin. Mr Rajbansi.
Mr Rajbansi

Madam Chair, the question as to whether we should have an effective executive head of State will be dependent on whether the Negotiation Council will agree to enforced power sharing or an enforced Government of National Unity. We are of the view that whoever is going to be the State President, should be the supreme – have supreme executive authority. But of course that can be subject to certain checks and balances. In terms of the present Constitution, thee State President does not act alone. He does not act alone. The executive authority of the State President at present of the country is vested in the State President who acts according to the present Constitution in consultation with the Cabinet. He acts in consultation with the Cabinet. And therefore we are opposed whether we have a Prime Minister or not to diluting the functions of the State President. Now the State President has to act in consultation with the Cabinet, then he is controlled by how Cabinet is going to take decisions. And also Madam Chair, in respect of the powers and functions of the President, let us not be accused of making a lame duck President when this country is going to have a President who is not going to be white and we will be accused of diluting the power of the President, especially in respect of the powers that are vested in the President in terms of the present Constitution, where he is actually the Commanding Chief of the South African Defence Force, he can proclaim and terminate Marshall Law, he can declare war or make peace. I mean these things are not contained in the powers of the President. And therefore we feel that the President shall have executive, complete executive powers, but in terms of the Constitution he acts in full consultation with the Cabinet.

Chairperson

Right, thank you. Are there any more inputs on that particular ... sorry Mr Landers, did you have your ... quite right Mr Landers. Sorry.

Mr Landers

Thank you Madam Chair. Madam Chair, yes in our view the President should be an executive head of State. He should become both head of State and head of Government and then withdraw from the National Assembly and be replaced by a member chosen from the relevant party list as is contained in the Technical Committeeâ\200\231s report under 4.1. We believe that the State President should be elected indirectly and as I have already stated he should

be a member of Parliament.

Chairperson

Thank you. Mr Hettasani.

Mr Hettasani

Thank you, Madam Chair. I would like to emphasise what was said by the two previous speakers, Mr Rajbansi and Mr Landers, without repeating what they have said. The feeling that the head of State or the President should have executive powers and go about his daily business with the consultation with the Cabinet, is highly ? in that we should bear in mind that that person, that Cabinet should not be a Cabinet made up of one party as we have today, but shall have a Cabinet made up of people from different parties as it is envisaged here. Therefore, his having complete executive powers shall in no way endanger other people because the Cabinet with which heâ\200\231ll consult before he makes a decision is a Multi-
Party Cabinet made ... is a mixed bag of people and therefore there wonâ\200\231t be any chance of
him becoming a dictator for that matter which is the most feared thing. So for that reason we feel that the head of State or the President should have executive powers. Thank you.

Chairperson

Dr Venter, would you like to respond to any of the comments? Have you taken note of those comments? Thank you. Shall we continue then onto Question (b). Should the President be elected directly or indirectly? Would anybody like to ...

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Madam Chair can the Technical Committee perhaps highlight the factors which favour a direct election, because they have elaborated on the factors which favour an indirect election.
It is just for interest sake.

- Dr Venter?

Well Madam Chair, off the cuff. Direct election of Presidents worldwide are done under circumstances where the Presidency is, has legitimacy and a stature at least comparable to that of the legislature and the judiciary. But basically, because of the fact that such a person
is elected popularly by means of direct election, the best examples of that would be I think
again the United States of America, France would also be a good example, where the Presidencies have a roll I think slightly more enhanced to that which heads of State, which are indirectly elected usually have. But the basic consideration speaking for a direct election
is that such a person obtains the legitimacy of the exercise of his powers and his discretions
from being popularly elected. He or she then speaks for the people in the same way as Parliament does so. There may be other considerations my colleagues might want to add.

Chairperson

Right does anybody else want to make an input? Mr Rajbansi

Mr Rajbansi

In connection with the Annexure 2.2 the choice which the Technical Committee has ? has, is the Chief Justice makes the rules or as suggested by the Technical Committee that the rules be provided for in a schedule in the Constitution, I would very strongly support that the Technical Committee arranges that in a schedule in the Constitution. 2.1, Madam Chair is, must be read with the power given to the IEC and the time the IEC has given to declare free and fair elections. Now if we say that the President shall be elected within 15 days after the General Election, and suppose the IEC takes the maximum time to declare an election free and fair, then it is definitely going to have an impact on the 15 days. And I personally believe that the 15 days after the election is a bit long. Particularly from the point of view that we havenâ\200\231t got a democratically elected legislature. If there was in existence a democratically elected legislature then this will be okay. And I want to suggest to the Technical Committee to examine the 15 days in the light of a provision in the IEC Bill giving the IEC certain time limit to declare an election free and fair and the impact it is going to have. And if everything is okay I want to suggest that the 15 days be reduced to 10 days. And if it is not possible to elect a President within 10 days then provision be made for that also.

Chairperson

Right. A technical point there from Mr Rajbansi. Would anybody like to respohd from the Technical Committee? No. Right, I think if we could just go back to paragraph a, I think

it might be better if we just, for the sake of the minutes get some absolute clarity. Dr Venter, I think, what I suggest we do, instead of just leaving the discussion hanging in the air, if I take each of those questions and just put it to the House, should the President be an executive head of State? Does everybody agree. Right can we have that agreed for the minutes? Should the President be elected directly or indirectly? Indirectly, so put it to the House the President should be elected indirectly. Right, Mrs Kruger.

Mrs Kruger

Thank you Madam Chair. We agree with that as well. I just want to raise section 2.1. I understand from the Technical Committee that there is a problem of including the Senate in the people that would be electing the President and I understand that because the Senate would be, or the SPR Legislatures will only be appointing Senators within 10 days of their first sitting. But my concern is that in all other important decisions made by Parliament, there is unison in the National Assembly and the Senate required or at least a joint sitting.
And I wonder what the implications of that sort of standing rule would be if the President is to be elected only be the one House. Would that affect the relationship between the two, because in all other important decisions there seems to be a feeling in the Constitution that both Houses should be considered. :

Chairperson

Right. Dr Venter.

Dr Venter

Madam Chair, I think one should also take into consideration that the Senate would be an indirectly elected body. But as part of Parliament, part of the Legislature, it should be involved in the consequent relationship between the Legislature and the Executive. That was basically what they had in mind.

Chairperson
Sorry, would you like to come in first?
Advocate Moseneke?

Ja, before she does just to end up, it would be always helpful for members to visualise the staggered nature of the transition at that point. From the elections themselves. Several things have to be put in place and to precede others. And one of these obvious difficulties would for instance be declaration of the elections to be free and fair by the IEC for insta nce
and the time within which it should be made as Mr Rajbansi points out. But immediately thereafter you have to find a time limit within which to convene the National Assembly for instance. You must also synchronise the time limit within which to convene SPR Legislatures who in turn must indirectly elect Senators. So if in fact, if you can stagger the
time, the processes, it may well be that you may end up with a very long, a prolonged period, this first time around without a President and there may be something to be said fo r
doing it differently the second time around. But the first time around it may not be desira ble
to have an extended period in which there will be no executive head of Government. I just wanted to raise that point. Thereâ\200\231s nothing in principle about, of excluding the Se nate. In
other words this was not done with a view to excluding the Senate. The main consideration was to ensure that there is some for of executive governance at the critical time of the Transition.

Chairperson
Right. Mrs Kruger.
Mrs Kruger

Thank you Madam Chair. I agree fully with what the Technical Committee is saying. There is a practical difficulty and we recognise that. We were just wondering if there werenâ\200 \231t any
other way in which provision could be made for the inclusion of the Senate in the election of the President. Because what I foresee, which might be a very slight possibility, but if there is a feeling or a feeling starts to develop between the two Houses as to the National Assembly sort of being the boss and the Senate feeling that it is just going to, an extra b ody
or something of that kind. That if you have one of the bodies or one of the Houses excluded in the election of the President there might develop such a feeling and I think that workin g
together between the two Houses is of great importance for the transitional period. So I wa s
just wondering if there is no other way around this difficulty in including the Senate.

Chairperson

Right, Professor Wiechers would just like to respond and then Mr Hettasani.

Professor Wiechers

Yes, thank you Madam Chair, Members. We didnâ\200\231t discuss it in the Committee, but I was listening with respect to Honourable Member, Mrs Kruger and it is true off course that in all important decisions the Senate and the Assembly jointly or separately take decisions. And it seems to me there is a possibility that the Presidents elected by the National Assembly and that this election within a certain period of time when Senate is being composed be ratified in joint session. If it is not too cumbersome, but it establishes the principle that is being expounded here.

Chairperson

Mr Hettasani.

Mr Hettasani

Thank you Madam Chair. Professor Wiechers has already taken the words out of my mouth. What I was going to suggest was since the, one segment of the Parliament shall have now elected the President, therefore that election should be subject to the approval or ratification at a later date by the Senate, which on that date is not in existence. So that the immediate election of the President be subject to ratification or consummation whatever word may be used. Already, Professor Wiechers has already. conversed that.

Chairperson

Right. So youâ\200\231re satisfied with that response? I think we have got another question ... sorry? Mr ?

Mr ?

May I just point out that what the last speaker is saying and what Professor Wiechers had suggested are not exactly the same thing. I thought Professor Wiechers was suggesting that a joint session of both Houses would ratify it later and not that Senate would ratify it later.

Mr Cronje?

Madam Chair, you canâ\200\231t make, give Senate in this important matter a veto. Itâ\200\231s got to be a confirmation then by the Houses sitting jointly.

Chairperson

So are you proposing just a process of confirmation rather than a veto right? Right, I think that is quite an important discussion point relating to that particular issue and relates to (b) as well, whether the Senate would be in a position to be involved in the process of election at the beginning. It seems like from the way the process will unfold that might not be the case and is there now agreement though that it could go back to the Senate, to a joint sitting

for ratification. Is there agreement on that? Just to give the Technical Committee some instruction. Mr Landers would like to come in.

Mr Landers

Madam Chair, would that not create uncertainty in that critical period of transition, which is what we are trying to eliminate. I mean we donâ\200\231t know, as has been pointed out by
Advocate Moseneke, we donâ\200\231t know how long the SPR Legislatures are going to take to choose or to elect their people to the Senate. It could take a whole year. Now, what we are saying then is that the elected State President then is actually put on ice until the confirmation
by the Senate. And really I believe that as pointed out for this first time, let us accept that
he is going to be appointed by the National Legislature without the Senate and the Constitutional Assembly can then for the next time around look at procedures that would include possibly the Senateâ\200\231s involvement.

Chairperson

Right, I think we have two different positions emerging here. One is saying how is the Senate going to be involved? Is there a process for involvement? One is being sort of suggested by the Technical Committee. Mr Landers is saying does this not lead to uncertainty and lead us in an ambivalent situation? Mr Eglin.

Mr Eglin

Mr Chairman, I think we could go no further than ask the Technical Committee to look at whether in fact the Senate can in practice become involved or not. I mean if it could be done
it would be desirable. If in fact it is not possible this would fall away. But may I just raise
one other point Mr Chair ... Madam Chair and that is this that the Democratic Party had we been discussion what I call a final Constitution, we would have argued very favourably and strong of a directly elected President. We are not discussing that and so that we will put that
on one side. But we believe in these circumstances of the interim or the transitional Constitution, it is important to get that Presidency in place as quickly as possible via the
election for the general, for the Assembly and therefore we will forego that and we will support the concept of an indirectly elected President for the transitional period.

Chairperson
’Right, thank you. Dr Venter wanted to come in. No, pass. Right.

:

Right, I would have no problem with the, what Mr Eglin said that the Technical Committee should consider this matter further and looking at ways and means of involving the Senate and whether or not thatâ\200\231s possible. However, I think we should say to the Technical Committee that any proposal which emerges must take into account the point made by Mr

Landers, that there should be no uncertainty during that crucial period. You do not want to have a tentative head of State.

Chairperson

Right, thank you. Additional proposal to Mr Eglinâ\200\231s? Mrs Kruger.

Mrs Kruger

Thank you Madam Chair. I was just thinking again, at decisions of the SPR Legislatures, it seems that after the election they have to have their first session within seven days after the election. And then after the first session within ten days after the first session commencing, they have to appoint the Senators. So if I am correct and the Technical Committee might direct me on this, it gives them 17 days and then a Senate will be established. If we are saying that the State President should be elected within 15 days what we are actually talking about is a difference of two days. I am not sure whether, Iâ\200\231ve just looked at this and I am not sure whether I am right. Maybe they could just direct me.

Chairperson
Would the Technical Committee like to respond. Mr Chaskalson.
Mr Chaskalson

Well I think the 15 days is the outside limit. There is no reason why the Assembly shouldnâ\200\231t convene as soon as it is elected to elect a President, it could be done the same day or the next day. It is merely an outside limit. So I think there will be, there is a number, there is inevitably a delay in the process if the Senate is to be involved because there has to be a delay in getting the Senate together. 'Whether it is one day, five days, ten days, there is going to be a delay.

Chairperson
Right, Mr Rajbansi.
– Mr Rajbansi

Madam Chair, I personally believe that ways and ... that ways and means should be found to include the Senate. But not to confirm the election of a President for the following reason. One is that the main emphasis on the transitional period is that we have a Constitutional Assembly. And the main argument the Technical Committee gives in respect of the withdrawal of the State President from Parliament is that he is going to be like a fatherly figure. So if he is going to be like a fatherly figure, the children, all the children must have a role in finding their father.

Chairperson

Thanks. I think we have had a good debate on that issue and I think that we have agreed that the President shall be elected indirectly, but the involvement of the Senate has been put as perhaps a problematic issue. I think there have been proposals that how, the Technical Committee should look at the involvement of the Senate, but it

should not whatever the proposals are that they come back with should not jeopardize the position of the State President unduly and lead to uncertainty. So I think thatâ\200\231s the instruction to the Technical Committee to explore a little bit further, have a look at the time delays and the parameters of that. Thank you, I think if we can move on to the next question then. Which is "Should the President be a member of Parliament?" I have two agreed, any more? Should the President be a member of the Parliament? Do you agree to the question, can I ... no. Right, would anybody like to make an input besides shout? Mr Rajbansi.

Mr Rajbansi

I want to raise a point in clause 14, paragraph 14 of the Annexure. I support that the President should not be a member of Parliament after heâ\200\231s elected, he or she is elected. But, I just want to mention ... make certain comments in respect of 14.1 and 2. 1 is that notwithstanding the fact that there may be a deputy State President or a Prime Minister, the rights, the full rights of the President with the exception of him not being allowed to vote, shall always be maintained. He should have the power to enter any debate. He should be given as much time as he desires so by arrangement, etc. But 14.2 worries me. That in respect of replying to a question in a House, must the State President come, be summoned as a result of a resolution of a Senate or a resolution of the National Assembly. Iknow what the Technical Committee is thinking. That if you have a special debate where the National Assembly and the Senate can summon the President, in other instances the President comes on his own initiative, I agree with this. But let us make a distinction between the ordinary weekly questions and questions of a specialized nature relating to the purpose of him being summoned. Because questions can be put to the State President in the weekly order paper. We must make a distinction between the two.

Chairperson
Right, Mr Landers and then Mr de Villiers.

Mr Landers

Madam Chair. I seem to have misunderstood the question on the proposed agenda. So let me state our position in this way. We are in favour of section 2 subsection 4 of the Annexure. In other words that on being elected the President shall vacate his or her seat in the National Assembly and the political party to which he or she belongs. Then we are also in principle in favour of 14 subsection 1 ...

END OF TAPE 2 SIDE 1

TAPE 2 SIDE 2

Mr Landers continued

. of the Annexure. With this qualification we would promote the idea of a Prime Minister rather than a vice-President or deputy-President to be included in 14 subsection 1. And that this Prime Minister shall be the Chairperson of the Cabinet in the absence of the State President, should act as in the State Presidentâ\200\231s capacity in his absence, or his or her absence and should also be responsible for the day to day running of the Cabinet. And that would be our position. And so in answer to the question "Should the President be a member of Parliament?", that is how I would have answered it, as I said I quite misunderstood the question in the Agenda. :

Chairperson

Maybe we should just clarify this question and perhaps break it down into subsections, so we understand it clearly. Just let us give Dr de Villiers an opportunity.

Dr de Villiers

Chairperson, very briefly I would like to just state our position on the question whether the President should be a member of Parliament. We would argue that the President should not be a member of the Parliament and the reason for that is our whole approach that there should be division of powers, we should never again concentrate as much powers as presently in the hands of a President. There should be checks and balances and we believe for good government the Executive should be separated from the Legislative and therefore because of the separation of powers we believe that once elected the President should not be a member of Parliament. He can be summoned, he can address Parliament, various interactions can be built into the Constitution, but the President should not be a member per se of the Legislative.

Chairperson
Mr Landers wants to respond.
Mr Landers

No I am not going to respond. What I was going to say Madam Chair, is that perhaps the question should have read "Should the President remain a member of Parliament?".

Chairperson
Right I think that is what it means as I see it. Mr Mahlangu.

Mr Mahlangu

Madam Chair, I am just having a little problem with this phrase. The logic involved in this. It is said reference is made to subsection 2 I think. Now it is said this person, was this? to the person as elected as the State President, then you will have to vacate a seat as a member of the National Assembly. You also vacate a seat in the political party into which he

belongs. Yes thatâ\200\231s what it is. I mean that is what the section says. Thatâ\200\231s what the section
says. Now 4, on being elected the President shall vacate his or her seat in the National Assembly and the political party to which he or she belongs. My argument Madam Chair irrespective of what other people comment from the Floor I have a right of putting my argument forward. I say it is illogical to do that. This person is a member of a party, most
probably is leading a party, now you come, he is the State President, now you say he must vacate this very people who brought him in Parliament. I think they have confidence in this man. Now you say he must vacate that. Unless I am convinced or perhaps somebody can – give reasons, why is it bad if this person becomes the State President and remains a member of Parliament? What is wrong in that? I mean even we say he now resigns to be a member of Parliament, does he change to have the ideology of his party? What is it that you get if you say he must resign as an elected member and now hold only the portfolio of being a member of Parliament?

Chairperson

I think Mr Mahlangu, the first one is a technical way of reading that sentence that perhaps needs to be perhaps tidied up so people donâ\200\231t misunderstand it. But heâ\200\231s second one is heâ\200\231s
put a question, can the Technical Committee please respond. He is saying what is wrong with it remaining a member of Parliament if heâ\200\231s the State President? So if the Technical
Committee would like to respond to Mr Mahlanguâ\200\231s question. Heâ\200\231s put a question.

Advocate Chaskalson?

Well I think first of all Mr Mahlangu is right, the comma is in the wrong place. The comma should come after Assembly and not after belongs. And I think that was what was probably intended. But as to whether the President should remain, I think the arguments are those that have been set out in their report and by other speakers and that is
that you bring about a separation of powers, you separate in some respects the head of the Executive from the head of Parliament, you leave the head of the Executive free to deal with
the day to day matters of running of the country which is a very exact thing and are likely to be quite burdensome during the transitional period and you enable the head of President not be subjected to the sort of attacks which are commonly launched upon Parliamentarians within Parliament. So it has got practical and other reasons. But thatâ\200\231s really the issue for
debate.

Chairperson

Are there any more comments on that?

Mr Eglin?

BLANK ... to attend and address. Sitting in really means you are part of the BLANK ... attending is you are not a member of Parliament, but you can attend and you can address. What this 14 does not make provision for, however, is the President himself summoning a

session of Parliament in order to address it. He merely says that the Assembly made by resolution summoned, there should be circumstances in which he in fact can require a session to be held in order to address it.

Chairperson

Right, Dr Venter.

Dr Venter

Madam Chair, the question of the head of State summoning Parliament was dealt with in Chapter 4 as well where the emphasis was shifted to Parliament deciding for its, on its own

what its times for sessions and so on should be except the initial ones.

Chairperson

Right, Mr Moosa. Pass. Mr Rajbansi. Are you ? Mr Rajbansi. Sorfy I was ...

Mr Rajbansi

Madam Chair, in connection with the points raised by Mr Eglin, I suggest that the Technical Comnmittee very seriously considers that. For example if the State President has to be accountable to Parliament, he can not go and urge members of the Assembly to adopt a resolution ? him. Letâ\200\231s say if a crisis has developed and the State President wants to inform Parliament, he must have the necessary authority in the Constitution to summon Parliament for that purpose. If there is a border dispute and somebody has to declare why he has to defend the country and he has to take action, the first institution he will inform is heâ\200\231ll inform his Parliament. I am referring to occasions like that, where the President should have the authority to summon Parliament to address Parliament.

Chairperson

Right, Mr Eglin do you want to respond? Right, then I think that brings us to the end of the discussion on (c), I think if we take Mr Landersâ\200\231 suggestion that should the President remain a member of Parliament after appointment. We have discussed paragraph 2.4 and paragraph 14.2 in conjunction with that and am I correct, it seems to me that it is acceptable to most people 2.4 as it stands. Am I correct in suggesting that 2.4 as it stands – Mr Mahlangu did have a few questions, but I think they were answered.

Mr Mahlangu

I merely wanted clarification. I am not objecting.

Chairperson

Right. 2.4? So then can 2.4 then be agreed? Then if we get to 14.2 it seems that there

have been some proposals as to perhaps expand on that role of the State President and perhaps the Technical Committee could be looking at that. So otherwise the State

President then should not remain a member of Parliament and those clauses then would

clarify that position. Agreed? Thank you. If we can move on to the question of the Deputy vice-President then. The question as it stands here: "Should there be a Deputy vice-President and what should the powers and functions of such office be?" Right, I have some noâ\200\231s. Does anyone want to motivate their no or am I just going to take a no
or ... Mr Rajbansi.

Mr Rajbansi

Madam Chair, if you look at the responsibility of the Prime Minister and that of the Deputy State President, itâ\200\231s more or less the same. Why then have a Deputy President or a Prime
Minister and it is our view that a more dignified position will be the Prime Minister. And we donâ\200\231t want a situation where, I donâ\200\231t know where this idea that the Deputy vice-President
should come from a party other than the party of the President. In the light of, and I may say that there was a contest like this where the leader wanted somebody to become second and on the right hand rail another horse shot the race and took second place.

Chairperson

Right, Mr Landers.

Mr Landers

Madam Chair, yes we have already said that there should be a Prime Minister rather than a vice-President. The Prime Minister in Parliament can then deal with the hurly burly of parliamentary debate and act as an excellent buffer for the State President who will in this
case be aloof of that hurly burly. And as I have already stated he would then act as State President in the absence of the State President or in cases where the State President or in

cases where the State President is incapacitated and the Prime Minister should also be responsible for the day to day running of the Cabinet.

Chairperson

. Right, Mr Salojee.

Mr Salojee

We too would like to say that there shouldnâ\200\231t be a position of Deputy President but the Prime
Minister. And we would also like to say that the way that it is suggested that the Deputy President should come from a party other than the Presidentâ\200\231s party, but we would like to
say that there must be a Prime Minister and the Prime Minister must come from the Presidentâ\200\231s party.

Chairperson

Thank you. Mrs, Miss de Lille. Then Mr Hettasani. Mr Moosa.

Ms de Lille

Thank you Madam Chairperson. We also donâ\200\231t see the need for a deputy or vice-President.
Because the President is indirectly elected by Parliament.

Chairperson

Right, thank you. Mr Hettasani.
Mr Hettasani

Thank you Madam Chair. Our reasons for not being in favour of the vice-President are the following. As long as there is a Prime Minister the vice-President becomes an extra spare wheel on the motor vehicle. If I may now raise a question here, who is the vice-President of the United States, I can bet that 10 or 15 here wonâ\200\231t remember him. But we saw him on the day that the President of the United States was being inaugurated, but heâ\200\231s now completely obliterated or gone. Now weâ\200\231ll have the same situation here and that will be perhaps wastage of State monies or a wasting of a manâ\200\231s capabilities, because he may be a very competent man who is now put in a situation where he has no power at all. So the best thing is to actually do away with it and in his place as others have already mentioned have a Prime Minister who will have the power and who will be effective.

Chairperson
Right, Mr Moosa.
Mr Moosa

Chairperson the name is vice-President Gaw. This question, if one looks at the report of the Technical Committee, it arises within the context of interim Government of National Unity. Now there are a number of other sections and other questions that relate to this matter. There is the question of should there be a Deputy President or a vice-President if there should be what would he or she do. Then thereâ\200\231s the question that comes up later about the composition of the Cabinet. How should the Cabinet be composed because weâ\200\231re talking about an interim Government of National Unity, what should the cut-off points be, how would the Ministers participate in the policy directives and those sorts of matters. How would Ministers be appointed. How would Cabinet itself take decisions? All those questions are very related. And I would think, Chairperson, that it would be rather difficult for us to address any of these matters in complete isolation. Because when we look at the functioning of a government of national unity weâ\200\231ve got to look at it as a package, that at the end of the day what we are trying to say is that prior to the finalisation of the Constitution, prior to the Constitutional Assembly, adopting a Constitution, we need to establish an interim government of national unity. One which would build unity, build reconciliation, one which would involve a meaningful participation of all parties who win the support of the electorate. So that concept needs to be fitted in somehow. I would want to suggest that we should not go into finalising this matter here and now, because itâ\200\231s really linked to a number of other questions. And itâ\200\231s a matter which perhaps we may not even be able to finalise today. We do have a break. I donâ\200\231t know if the Planning Committee has suggested a break of a number of days. And that certainly we would like to engage other parties in bilateral discussions on some of these questions before an exhaustive debate and further instructions to the Technical

Committee.

Chairperson

Right. Mr Moosa has proposed that we donâ\200\231t finalise this now, though most of the speakers have been against the Deputy vice-President, but maybe wise words. We havenâ\200\231t yet come to grips with what a government of national unity is actually goin g to
mean in this transitional Constitution. So he suggests leave it in abeyance. Let some bilaterals have a look at it and then come back to it, as I gather from his proposal. Is that acceptable to the House, that we leave that? Right, thank you. Letâ\200\231s leave tha t.
Right, I have another proposal, a break for lunch and I have had a request for a Planning Committee meeting at, right now. Can we break then for lunch? Is that acceptable? Thank you. And can we please reconvene sharply at two oâ\200\231clock, so we

can make progress. Thank you.
NEGOTIATING COUNCIL RECONVENES AFTER LUNCH
Mr Gordhan?

... Thank you Chairperson. Youâ\200\231ll recall ladies and gentlemen, that this morning we presented a report on the time frames to be followed in respect of tabling of legislation i n
Parliament on the one hand and there was a debate here about certain amendments that we have suggested. One to on behalf of the Planning Committee put forward the following report to you. The first aspect that we need to recall is that on the 6th of November as th e
result of a recommendation from the Planning Committee, the Negotiating Council accepted that a task group of five persons would be constituted with a view that that task group wou ld
manage the liaison between ourselves and the Parliamentary process. We also agreed at that meeting that the Planning Committee will take responsibility for ensuring that there are no substantial changes to the legislation and where there are changes it would scrutinise thos e
changes to ensure that if those changes are substantial they will bring it to your notice o r
attend to that on your behalf and then report to you. Itâ\200\231s against that background that certain
developments took place over the last few days. And I would like to having had this investigated by representatives of the Planning Committee report the following in respect o f
the so-called amendments that we spoke about earlier this morning to the IEC Bill and other s.
We now have on record that an approach from the relevant Government department was made with a view to introducing an amendment. That department was informed that the procedure is to hand in that amendment at the office of the task group which has been set u p
in Parliament where a representative of the task group is available on a full-time basis. A nd
this was done. That amendment having been received by the representative of the task group, it was submitted to the Planning Committee. The Planning Committee looked at this amendment and decided not to approve the amendment. The relevant department was informed accordingly and accepted the view of the Planning Committee. In the view of the Planning Committee this amendment was not a substantive amendment in one sense and having dispensed of this matter in line with the procedure established on the 2nd of September felt that the details need not be reported to the Negotiating Council. Off course we stand corrected on that if you so think otherwise. The next set of issues ladies and gentlemen pertaining to the IEC as a whole. Once again a number of technical amendments have been submitted for consideration. The task group and the Planning Committee have

looked at these amendments and theyâ\200\231re mainly formal and technical amendments. Ther
e are
no substantive changes to the Bill and in line again with the mandate given to the Planning
Committee has approved these changes and the relevant people in Parliament will be
informed of that. At some stage Chairperson we require noting of this and if any comments
need to be made, comments on this from the Negotiating Council. Over the last, say 24
hours or so, a procedure is beginning to unfold on the basis of the earlier decision of the
Negotiating Council in terms of the relationship between the Parliamentary process and the
process here. The task group has attempted to document that and within a short while copies
.
of that document will be circulated to you so that youâ\200\231re aware of what steps are b
eing
followed, many of which I have already covered in my verbal report to you.

Finally and unrelated to this, the Planning Committee wants to make ourselves aware that
on the 12th Report of the Constitutional Issues Technical Committee, a number of
submissions were invited from legal bodies, such as the Bar Council, other bodies such as
the Black Lawyers Association and the Chief Justice. Those submissions we believe have
not come in yet and we need to take account of that in our debate. And what we are saying
is that the Negotiating Council will await those submissions, will â\200\230give the Techni
cal
Committee an opportunity to address those submissions before making any clear-cut decisions
in respect of the 12th Report. And perhaps in the debate on the 12th Report ladies and
gentlemen you would note the sentiments of the Planning Committee in this regard. Thank
you Chairperson.

Chairperson

Thank you Mr Gordhan. I think there are two issues heâ\200\231s addressed there. The first
is the
report back that heâ\200\231s given from the Planning Committee regarding the amendments we
discussed earlier. Does everybody accept that report? Mr Rajbansi?

Mr Rajbansi

Madam Chair, I would not request any further elaboration but Mr Gordhan referred to a
submission thatâ\200\231s going to made from the task group. â\200\230And if the details of
the proposed
amendment could be included in that submission, because I think it is important that Counci
l
members should be aware, should be aware of what changes the relevant Government
department wanted. Because I think we decided to let this matter rest earlier on. But Mr
Ramaphosa unfortunately is not here, whoâ\200\231s actual words were that the Planning Comm
ittee
was not open and fair to the Council. But after hearing Mr Gordhan, we have no reason to,
shall I say doubt what he had stated. And I think the Planning Committee acted correctly
under the circumstances.

Chairperson
Right then so ... Right Mr Gordhan.
Mr Gordhan

Chairperson I think we need to note that the Council has a procedure and weâ\200\231ll foll
ow that
procedure. Should a participant require details, perhaps the Administration can be

approached and those details can be obtained from them.
Chairperson

Thapk you. Mr Landers.

Mr Landers

Madam Chair, we, those of us who are in Parliament have a distinct advantage over other who are not there. So are we saying then that the organisations that are in Parliament are in a position to put forward amendments while others are not? Thatâ\200\231s my only diffic ulty.

Chairperson
Mr Gordhan.
Mr Gordhan

What we are saying is that those organisations that are participants of this process and ar e
in Parliament would in a sense be obliged in terms of the agreements that we have reached here to ensure that no substantive changes are made. Should those changes be of a technical or formal nature, then the procedure outline will be followed by them. Where, and off course by tally if parties are not in Parliament they are unable through the Parliamentary process to influence any changes. But I think at this stage we need to clarify for ourselve s
that we are only talking about technical and formal changes which might result in a better formulation, remove any doubt about a formulation, rather than substantive changes which none of us are hoping will be made. ’

Chairperson

Right thank you. I think that is very clear. Can we move on to the next report. Thatâ\200 \231s
from Mr Titus. I think this has been distributed to everyone. Has everyone got a copy? Report of the outcome on legal action instituted by the KwaZulu Government. Mr Titus.

REPORT BACK FROM MR TITUS NOT DEALING WITH THE CONSTITUTIONAL
DEBATE

Chairperson

Right thank you. That seems to be all. Then weâ\200\231ll continue with the Technical Commi ttee
and on the Constitutional debate. If we can return where we left off on ... can I just ask the
Technical Committee, we havenâ\200\231t, it looks like an "e" thatâ\200\231s missing betwee n (d) and (f).

Are we missing a point or is there no point missing?

?

Just to make it interesting.

Chairperson

Okay right. Well then letâ\200\231s continue under Prime Minister, section on Prime Minister.
â\200\234â\200\234Should there be a Prime Minister and what should the powers and functions of such office
be?" I think we have had a previous discussion on deputy, that obviously this whole thing is part of a package. Now whether Mr Moosa thinks this question applies to that and whether weâ\200\231ll open it for debate and then return to see how far we get with the debate. So
can I have any inputs on whether there should be a Prime Minister and what the powers and functions of such office would be. Does anyone want to make an input? Mr Rajbansi.

Mr Rajbansi

Madam Chair, I go along with the suggestion made by Mr Moosa that there is no need to debate this before we have a discussion on how the Executive should be composed because it would definitely have a bearing on this.

Chairperson

Right, there has been a proposal that we perhaps come back to this later. Does anybody have a contrary viewpoint? Right then weâ\200\231ll come back to this later and treat it similarly to the position on the Deputy vice-President. Okay if we can then go to the Cabinet. There are five questions there. Letâ\200\231s take them one at a time. "Should the Cabinet be proportionally appointed multi-party body or a winner takes all government?" Youâ\200\231ll find the pages, page 29, the paragraph 3 of the Eleventh Report and page 41 which is section 10 of the Annexure. So should it be proportionally appointed? Nobody wants to talk on this important issue? Mr Desai.

Mr Desai

Yes, we want to talk on this important issue. But I think ? our point of view ...
Chairperson

˜ Well I think you better get it down on the record.

Mr Desai

Let us restate our point of view again. That we do not believe that the Cabinet should be proportionally appointed. We believe that if there is to be a coalition, then there probably
is a strong case for a coalition to solve some of our very difficult problems. That this coalition should come about as a result of a political process rather than being entrenched in
the Constitution. Therefore we would go along with the proposition that is well accepted in

democracies all over the world, that the winner should appoint the government.

Chairperson

Right thank you Mr Desai. I think it is very clearly put, the PAC position. Mr Eglin.

Mr Eglin

Well Mr Chairman, once again weâ\200\231re dealing with a transitional Constitution and the point
that Mr Moosa made is relevant. In the transition do we want to have something
approaching a government of national unity? And because we believe that in the transitional
government that approach should be a dominant one in the transitional Constitution, but not
necessarily in a final Constitution. We believe provision must be made in the Cabinet
through the Constitution for some sharing of office in that particular Cabinet. As to the
question of decisionmaking and all there is concerned, that is another matter. But in broad
principle we feel that parties that give reasonable representation in the Legislature shoul
d also
have access to the transitional Cabinet.

Chairperson
Right thank you. DP then having an alternative viewpoint to that of the PAC for the
transitional Constitution. Any other participants wanting to put their viewpoints forward?
Mr Landers?

Mr Landers

Madam Chair, yes, the purpose of this first democratically elected Constitutional Assembly
would be amongst other things reconstruction and reconciliation. And we believe that the
means to achieve that reconstruction and reconciliation would be through a government of
national unity. And the only way to achieve such a government of national unity would be
through a proportionally appointed multi-party Cabinet. And we believe that this should be

set out in the Constitution.
Chairperson

Thank you. Mr Moosa.
Mr Moosa

Chairperson, as I have said earlier that we are in favour and we have always been in favour
of the establishment of an interim government of national unity, our view is that the inter
im
government of national unity should be composed purely on the basis of the election results
.
That there should be no pre-determined formula which would decide on which party, which
parties would be in the Cabinet and which parties would not be in the Cabinet. That that
decision should be left to the Electorate and therefore we would support the notion of
proportionality in the Cabinet. That a party, no party would have an assurance beforehand
that it is to be the second or the third biggest party or the second or the third most infl
uential
party in Cabinet. That would be a matter that should be left to the Electorate. We think th
at
it is reasonably democratic and at the same time would be taking into account the need for
a government of national unity. Off course in the event of a single party winning
overwhelming majority of the votes, quite clearly with such a formula that party would
dominate. But in the event of no single party winning a major proportion of the votes, then
there would have to be significant participation of a number of other parties with this kin
d
of formula. IfI could just say also, because I donâ\200\231t want to speak again, that the
Technical

Committee has suggested that the threshold for participation in the Cabinet should be 20 se
ats
in the National Assembly and thatâ\200\231s something we could go along with.

Chairperson

Right, we might come back to that. I still have on my list, I have Mr Cronje followed by
Dr Rajah. :

Mr Cronje

I think in terms of the philosophy that has been expounded by some other members, it is not
unusual, in fact it is accepted practice, and even in Africa elsewhere, it has been proven
to
be a successful way of dealing with the change from a dispensation to a new dispensation.
And despite some of the dangers which some people may see in such a thing, it actually
works very well from many points of view. (a) for sharing of experiences, (b) to build up
confidences and trusts and thirdly it creates a greater confidence on the part of the Elect
orate
as well. We from Bophuthatswana think that the government of a, a transitional government
is unnecessary and creates difficulties, but if there has to be such a thing, I believe tha
t the
government of national unity, whether it is prepared for constitutionally or whether it is
as
has happened elsewhere, just an arrangement for practical politics, but it is the best syst
em
of dealing with a change.

Dr Rajah

Madam Chair, I think the concept of sharing power in the transitional phase is a good one
considering also our background history and distrust, because we need a period of stability
and that stability can be reflected in a cabinet of various parties, it will only enhance t
he
functioning of government. But having said so Madam Chair, there are also other
responsibilities that go with the sharing of Cabinet duties and portfolios. Section 10.3 sa
ys
a party shall be entitled to a place in the Cabinet, but I presume that a party may also no
t
wish to take up that offer. I also presume Madam Chair that if a party is sharing a place i
n
the Cabinet, that it would not play the role of an opposition in Parliament, that should be
regarded as part and parcel of Government. And if it is part and parcel of Government I
also raised the question earlier on that that party will also take on the full responsibili
ties,
not only for the specific portfolio which a party enjoys, but also for all responsibilities
and
decisions that the Cabinet as a whole takes. So therefore while the principle is good, it a
lso
places a lot of obligations on the parties who participate on the Cabinet in sharing this f
irst
phase or interim phase, the concept of a government of national unity.

Chairperson
Thank you. I have Mr Rajbansi, followed by Mr Rapinga.
Mr Rajbansi

Madam Chair, we support proportional representation in the Cabinet and we also support the
minimum threshold as suggested by the Technical Committee. We believe that in addition

to the reasons advanced, we must very, very strongly propose what is described frequently as corporate co-existence in South Africa. I want to deal with the appointment of Deputy Ministers as suggested by the Technical Committee. One is that ...

Chairperson

Sori'y, do you think that we should get on to that debate ...
Mr Rajbansi

Well it is silent even in ? Well Iâ\200\231ll come to it when you ...
Chairperson

I think let us rather finish this debate thank you. Mr Rapinga.
Mr Rapinga

Chairperson, weâ\200\231ll also like to support the speakers who support the notion of proportional representation in the Executive, but, however, would like to make it clear that proportional representation should not reflect what is called power-sharing or a coalition government so to say. I think the whole process of proportional representation should develop from a political process. It should not be a pre-arranged issue in such a way that the whole question of proportional representation can be abused where people see it as literary power-sharing and they get into that Executive with a mind that they are sharing power to such an extent that they can make it difficult, the functioning of the Executive per se. The same applies to the idea of a coalition government. Because a coalition government has to be balanced somewhere by the participants in the Executive, but if this arrangement of a proportional Executive representation takes that form, I think it would be quite difficult. So I support proportional representation but it should not mean power-sharing as people understand it. And it should not mean a coalition government.

Chairperson

Right thank you. Were there any other speakers whose hands I might have missed? Right, well I think the discussion on this question has I think besides for the PAC has shown support for proportionally electing the Cabinet. That the Cabinet will arise out of the being proportionally appointed. I think some people have noted reservations. There seems to be a slightly different perspective as to how they see the outcome of such a process. But I think people have mentioned we are in a process of transition, we must build confidence and this seems to be best mechanisms to see us through in this particular Constitution. So I donâ\200\231t know if the PAC would like reserve their position on that. But they seem to be the only ones whose standing against wanting ... theyâ\200\231re the only ones who are wanting a winner take all at this stage.

Mr Desai
We are not reserving our position. We are totally against it.

Chairperson

Right, totally against it. Very clearly put. I think then we can have a look at in actual f act
the next question which some people did address - "What should the threshold be for a
Cabinet composed proportionally?â\200\235 I think two people have suggested that they accep t the
5% cut-off which is the 20 seats. Thatâ\200\231s on page 41 paragraph 10.3. Can we just hav e some
other ideas, other people want to put ... Agreed. Dr Rajah.

Dr Rajah

Madam Chair, T would like to state that although the 5% cut-off ...

END OF TAPE 2 SIDE 2

Mr Rajah:

Mr Landers:

Mr Rajbansi:

Mr Meyer:

Chair:

Mr Meyer:

Mr Saloojee:

. I say this in the context of previous assurances given to minority partles that may contest the election. There is no justification for saying it has to be a 5% cut off. If you want to accommodate the interests of the smaller political parties. That option should be left to the government itself. If the results show that there is sufficient support for the political parties even if there are 10 or 15 seats than that offer should also be made to the minority party because the purpose of including proportional representation is to ensure that the minority parties have some form of representation in the cabinet. So there is no need for us to stipulate in the constitution what the cut off point should be.

We want to speak in support of Dr Rajahs proposal in this regard. We believe that the draft constitution can reflect this and this matter should be left flexible in the hands of the state president. So that the concept of proportionality can be reflected in the constitution but that the actual appointment procedure be left in the hands of the state president.

We are of the view that the proposals of 20 seats should entitle a party to a seat in the cabinet. But this provision should not prevent the president and the other parties who want to consider appointment of members from a political party that has gained less than 20 because as far as the legislature is concerned we are going to express another view of threshold particularly from the point of view of an excellent document on the inclusion of minorities submitted by the ANC in March last year.

The whole concept that we are looking at here is the one of the government for national unity for the reasons that have been stated already. In order to bring about such a government of national unity, on the basis as argued already of proportionality it would seem appropriate that this matter should be attended to in this constitution, and I am arguing against the statement of Mr Landers that suggest that it should be left in the hands of the majority party. In order to bring about a government of national unity on the basis of proportionality I would suggest that the way in which that government should be composed should be determined in the constitution and then a neat way of providing for that would be to provide for a threshold to ensure that parties can ensure reconciliation so that they participate on the basis of national unity.

You are then accepting the threshold but you haveâ\200\231nt commented on the 20 seats?

I support the 20 seats proposal.

We support proportional representation in the cabinet but there has to

Mr Cronje:

Mr Chaskalson:

Dr Venter:

be a certain amount of real electoral support to entitle a political party to have a place in the cabinet. We accept that the president must have discretion but our preference would be to have a situation... we think that 20 seats is a reasonable proposition to accept, but to have electoral support much less than that, we would have a problem of those parties having representation in the cabinet.

If you say that parties with 20 seats are entitled does it disentitle parties with less than 20 seats, it doesnâ\200\231t say so. What we suggest that while parties are entitled to seats I would like to read into the clause that parties with less than 20 seats are not disentitled for consideration for representation in the cabinet.

If we look at clause 5 it says that cabinet ministers need not necessarily be appointed from members of parliament.

The 5% is the entitlement but it doesnâ\200\231t mean that the president couldnâ\200\231t appoint members from parties that have less than 5%. the problem confronting the president in such a situation would be that it may have to come out of the presidents partyâ\200\231s allocation because if everybody claims their 5% all that would be left would be the presidents party, so it could be a practical problem.But the president could decide to accommodate other parties. :

Does everybody agree with that interpretation?
Agreed.

I donâ\200\231t think there is a problem as far as that is concerned. Because your cabinet distribution is based on 100% If you agree at the beginning that a party with 10 seats will get a seat than they form part of that 100%. But what we would like to see written into this clause is clarity that other parties may also be considered.

We must point to the last sentence of subsection 3 of section 10 again. The proportion relates to the number of seats held relative to the number of seats held by other parties represented in the cabinet. In other words if its 10%, its 10% not of the seats in the national assembly but worked out in terms of the number of seats held in cabinet by the different parties, because this anticipates that there will be parties who are not willing or interested in taking part in the cabinet. There will have to be some calculation to rework the proportions.

Where does this leave us with this clause? There seems to be some acceptance that there will be a cut off threshold point but there should be some opening for some discretion by the state present. Can the technical committee look at that clause and come back with the clause that meets the needs of the council. Agreed?

Mr Moseneke:

Mr Rajbansi:

Mr Chaskalson:

Chair:

Mr Saloojee:

Agreed.

Just to get clarity on the instruction. Will the discretion be exercised within the number of seats that the presidentâ\200\231s party may hold or do you say that there should be created additional space to make allowance for parties with seats less than 20?

It wont be a fair suggestion that if the president feels that they might be a need with the other leaders, to take it off from a party. Any party with less than 20, there must be sound reasons for a president to select a member to serve in the cabinet. Dr Venter made an interesting comment which might require a rewording of this clause, because it says that relative to the number of seats. held by other parties represented in the cabinet, that has a clear meaning that might effect what is being suggested. We are not setting down a limit of lets say 20 seats in the cabinet. If there are sound reasons to appoint a person from a party with less than 20 seats the logical thing to do is that since the present cabinet represents about 4 million people you are going to have 20 million people the president may add on one member to the cabinet.

There is still the problem that if there is a constitutional right of each party with 5% or more to the proportionate share in the cabinet than at the end of the day if everybody takes up their proportionate share there is no space left for those that get less than 5% unless all the

parties agree to forego or reach agreement on it. Because its an entitlement and not an obligation. So there has to be some arrangement to accommodate the parties with less than 5% or else the president if he/she wants to do that will have to forego one of the seats which would otherwise go the presidents party. You cant have a 101% and if everybody takes up their 5% all that is left will be the balance.

You cant follow through on this instruction because there wont be any seats left to give to the smaller parties.

What we are saying is that if the president wishes to invite one of these parties to be on the cabinet it must not mean that the number of places on the cabinet must be increased. If its going to be a cabinet of lets say 20, it must remain 20 so that if the president exercises discretion he/she will have to think carefully whether it would it would have to be at the expense of that party. So the numbers should not be increased.

I have made a few sums. If a party is allowed to.have one person in the cabinet for every 20 seats if they have 37 seats they still have only one seat you have 17 others to play with and that will give you extra cabinet ministers which the president may be able to allocate to what extra parties they might be.

Mr Moosa:

Mr Slovo:

Mr Eglin:

There could be run off figures in the allocation when proportionality is applied. But it is possible that you may not have empty spaces. It is possible that all of the parties that may have entitlement will have a number of seats as close to 20 as possible and then you would not be left with any run off. Those are eventualities, when we clean up the constitution we will have to look at how to deal with that. Coming back, if we are talking about proportionality than it really has to be proportionality and if you are to say that the president has the discretion to appoint people from parties with less than 5% of the seats in the national assembly than you would throw out the proportionality unless those people that are being appointed are given seats which some other party has an entitlement to. So the president could magnanimously reduce the number of seats from his/her party and offer it to some other party or some other minority party in the cabinet could offer one of their seats to one of their allied parties which might have less than 5% of the vote so that discretion is automatic. But it must mean that it has to come from the allocations. That is the only other way to do it and perhaps we should leave the cabinet with those options, the second option would be to say that if there is agreement among parties in the cabinet who represent a certain percentage of the national assembly say two thirds than some or other party with less than 5% of the vote should be granted cabinet posts than the number of seats could be expanded and it would mean that there wouldâ\200\231nt be exact proportionality. But that would have to be by agreement of the parties. Those are the only two ways in which it can work The first is unsaid. The leader of any party would be free to say I am entitled to 5 cabinet portfolios I nominate the 5 following people they donâ\200\231t all have to be from his party.

Mr Moosa what you are saying is that you accept the status quo but voluntarily there could be some reordering but you are also suggesting the possibility of expanding the cabinet under special circumstances.

Iâ\200\231m not sure that this will help but perhaps a third option is to work out proportionality based on 95% of the cabinet numbers, in other words the president would have 5% to play with in the case of parties whom he feels ought to be in but who havenâ\200\231t got the threshold vote, so the technical committee should examine these approaches. It seems that increasing the size of the cabinet doesnâ\200\231t help mathematically at all.

I presume that we are talking about full cabinet minister. I suggest that the committee should also look at the possibility of appointing those with less than 5% as deputy ministers.

It is different to depart from proportionality because you have only have 100% to share. Dr King seemed to indicate that every time you have got 5% you got a seat. What this says is that you need 5% as a cut off and after that its proportional but you donâ\200\231t share in the

Mr Eglin:

Chair:

Mr Eglin:

Mr Slovo:

proportionality unless you have that percentage. But there is one other factor, there may be a number of parties who in fact donâ\200\231t get 5% in which case there will be some floating percentage around which will not be allocated in the first instance and it may well be that the state president should have the right if he wishes to choose from a number of parties who together have 5% So a group of minority parties can say for the purposes of the cabinet we would like to be considered. But that would mean that they would have to collectively qualify for 5% in which case they could participate.

There has been quite a few ideas to take into account: the need to consider the minority party, but at the same time people having reservations about the way this would be done. The technical committee has to explore this a bit further. There seems to be some technicalities of percentages that seem to be escaping some of us right now. The overall agreement that proportionality is important but that perhaps there could be some latitude for discretion for the state president.

I also support the concept that for parties that may not qualify the question of deputy ministers .... as available. Because that is not a proportional representation as a deputy minister. That is in the total discretion in the cabinet but it may be a way that you accommodate parties of smaller representation.

Can we move on to the next question: Should cabinet ministers be members of parliament?

I would like some input on this because I am divided on it. I believe there should be as much separation between the executive and the legislature as possible and therefore cabinet ministers should not also have legislature functions, so as the state president has to cease to be a member of parliament he can nevertheless attend parliament and address parliament, on balance it would be preferable that ministers attended to the executive functions but are allowed to attend and address parliament, but they are not members of parliament, they are members of an executive would have a right to be accountable to parliament. Of course there are practical problems ....tape fades . You demote them from the cabinet and then they cease to be members of parliament. So they cease to members of the cabinet and they also donâ\200\231t have a parliamentary seat.

We support the concept of separation of powers. There is another concept and that is accountability and answerability. It seems to me that the best balance between the two would be for cabinet ministers to be members of parliament and to be answerable to parliament to be available as members of parliament at the same time in a way which would not interfere with their executive functions and these separation

Mr Rajbansi:

of powers. So we say yes they should be members of parliament.

We support the view of the SACP, that cabinet minsters must be members of parliament.

This question must be addressed in the context of this constitution because the election is based on the principle of proportionality. If a political party wishes to appoint a member whom they feel is capable of being a cabinet minister all they have to do is put his name on the list. If on the other hand we have a system of constituency based elections where an individual may not want to go through the trauma of election etc, then in that circumstances then the president could elect a member outside parliament, but there are provisions here that those circumstances do not prevail where an individual stands in his own right for the party he stands as a member on the list and therefore he should be a member of parliament. But where we have difficulty is that if he loses his place in parliament and also loses support of his party, he loses both his cabinet position and as a member of parliament. There must be some provisions that he retains his position in parliament rather than selecting the next on the list that individual must be entitled to a place in parliament.

I fully support that cabinet ministers should be members of the legislature. There is that one of the legislation arising out of our suggestion that members of the cabinet should come from the political parties. I want to suggest that during the November session there is going to be a need to present a legislation dealing with the definition

˜ of political office bearers. We now have to a have a clear definition of

the leader of the official opposition. Because the present definition is that the leader of the official opposition who is the leader of the party having the largest number opposite to the party to which the president belongs. We amend the present legislation or draft new legislation. In respect of cabinet portfolios, as is contained in the present constitution, cabinet ministers are appointed to administer a state department. There is also a need to appoint cabinet minsters who might not be required to administer a state department. In respect of deputy ministers I want to suggest that it will be unwise to appoint a deputy on the suggestion of a full minister. A deputy is not a full minister and he cannot take on the responsibility of a senior minister when that senior minister is not available. His responsibility must be given to another full minister by the state president. When you say he perform the functions and duties entrusted to such a minister means that he only administers on a delegated basis through the minister certain sections of the legislation which the state president requires the full minister to administer. Therefore 1 want to suggest that the method of appointment of the deputy minster should be the same as a full minister is going to be appointed and that the deputy minister really doesnâ\200\231t deputise for the full minister.

Mr Eglin:

Chair:

Dr Venter:

Mr Chaskalson:

Mr Moseneke:

Chair:

Mr Schoeman:

Clarification, on the basis that cabinet minsters must be members of parliament, on the assumption that the president wants to bring in somebody who is not a member of parliament, is there any provision by which he can be made a member of parliament, or is the assumption that the party that he is going to represent will have to get

somebody to resign and they have to nominate this person in his place.

That is a question which was addressed in the committees report on page 30. Where it suggests that cabinet ministers need not be appointed from members of parliament. We havenâ\200\231t addressed that. What are we going to do, if the state president wants to appoint a cabinet minister who is not a member of parliament, if we seem to have consensus that they should be members of parliament. Are we going to allow for this through a special clause. Would the technical committee like to respond?

If one rephrases the question to say should all cabinet ministers be members of parliament. That could be addressed. Anything could be arranged in a constitution but its something one should decide upon. Whether it should be possible to appoint a minister to cabinet to do a technocratic job, a specialist type of task.

To follow, there are some constitutions in which provision is made for a certain number of special seats ion parliament not necessarily carrying a vote, so if the president wishes to bring in people to parliament to perform particular functions, he or she can draw upon that right. In that event the person comes into parliament, has no vote but would have all the other privileges of a member of parliament and if a made a minister would be answerable to parliament. So there are techniques of bringing people into parliament without it necessarily resigning the seat if that were to be desired.

Council is dealing with an inherent tension between proportionality on the one side and other needs on the other. Needs for example for introducing expertise at cabinet level which would therefore disturb proportionality. Somehow there will have to be a balance, on whether what impact that will have on decision making for instance. Whether persons would come in on a particular ticket would be deemed to be apart of decision making as any other member of the cabinet. That is a problem which will arise. The second one is that there will have to a fairly easy mechanism for being able. to make people parliamentarians if they are not. Similarly if they were to leave the cabinet one would have to work out a mechanism to be able to see to that transition. :

I think you have opened the debate and said that nothing is clear cut in proportionality. There has got to be some latitude.

We favour the separation of the powers but a number of interesting

Mr Eglin:

Mr Desai:

Mr Rajbansi:

contributions have been made about the

accountability on the one hand and the separation of powers on the other. Therefore I suggest that we do not decide on this now but allow the technical committee to go into this matter further so that we see whether its possible to marry the two. On the one hand the separation of the power and on the other hand the accountability.

It seems that everybody is agreed on that. But to go back to Dr Venterâ\200\231s question, should all cabinet minsters be members of parliament. Cause we havenâ\200\231t really given them a guideline. The suggestion is that the technical committee comes back with possibilities of all being and some not being. Is that acceptable to the house? .

I accept that one could come with a number of devises including cabinet ministers that become members of parliament because they are experts. But we must be careful that we donâ\200\231t disturb the balance in parliament especially when you are dealing with special majorities, so it may be that you are not a member of parliament but you have a right to be in parliament. But a member of parliament is an integral member with a vote. So there are a number of issues which have to be taken into account.

So its not a simple issue and its over to the technical committee. Are you happy with the instructions. Right.

Thank You.
Lets move on to paragraph J. Decision making by the cabinet.

We believe that cabinet decisions should be made by a majority in cabinet. Where possible they should try and get consensus, if not by majority. More particularly since according to your decision, there is going to be a variety political characters in this cabinet. We donâ\200\231t want to see a paralysis ion government and therefore we donâ\200\231t want to see special majorities in the cabinet itself.

We would like to support proposal A. that the decision should have the support of the majority of cabinet ministers. If you want the cabinet to operate effectively than there should be no obstacles in terms of its abilities to take decisions.

The question one must ask is what does the cabinet decide upon. From experience I can say that minsters individually decide themselves many things. In the cabinet the president sums up the discussions and says this is the general thinking. Thatâ\200\231s how cabinet decides. So rather than dictating that it should have the support of the majority, it should be left to the cabinet itself to continue wit what is regarded as convention. We should never consider a deadlock breaking mechanism to decide

Dr Venter:

Mr Eglin:

Mr Hettasani:

Mr Slovo:

Chair:

upon what is the supreme executive structure in the country.

Mr Rajbansi has just described the workings of a Westminster type cabinet which is normally a single party cabinet which is appointed by the prime minister. This is different. A multi-party cabinet will most probably need some kind of deadlock breaking mechanisms.

We would support a majority decision. But it does depend on how you would compose the cabinet. There were various models. We would favour the guidelines given under example three and that is that in fact there has to be agreement on the general policy of the cabinet between the cabinet and the president and the prime minister and the prime minister then has to reach agreement on general policy with the minsters and the cabinet and the misters are always responsible to parliament for policy. It is not just a simple vote by the majority. So in that total package, we would believe that is the correct blending of getting overall policy agreement by negotiating but when it comes to taking formal executive decisions you might have to take it on a majority basis.

We support the decisions making by the majority of the cabinet for the following reasons, firstly that since this is going to be a multi-party cabinet the ministers who would compose that cabinet do not belong to one party although we are not unaware of the fact that the bigger parties would be more represented that the smaller ones. The smaller parties are automatically the balances and checks as is in most countries where they speak of the decision of the cabinet - sharing the same sentiments which amounts to bulldozing, so in this type of cabinet it will be more firm because those that make up the cabinet do not share the same ideology and sentiments and to caucus with them wont be easy, therefore the decisions will normally be well balanced. -

Its difficult for the Council at this stage to take a firm view on this issue because its all connected with the general scenario that we are going to eventually project for the cabinet, how it functions, policy guidelines and therefore the little debate will be of help but we should return to this question without taking a firm decision one way or the other.

I think from the discussion Mr Slovoâ\200\231s point is well taken, that may be the technical committee has listened to the debates and we

may come back to that later when some of the other parameters have been developed. Are you happy with that Dr Venter?

Right. Thank you.

If we can move on to K: Which variation or combination of variations

Chair

Dr. Rajah:

Mr Eglin:

Dr Venter:

regarding the composition of the cabinet is acceptable?

The procedures here are clearly spelt out. I donâ\200\231t think that 1,2 and 3 are mutually exclusive. The procedure layout out is straightforward. It gives the state president the right to appoint cabinet ministers. He appoints it on the basis of proportionality. It must consult with the leaders of all parties entitled to those seats. The president should have the prerogative to appoint those portfolios. Up to that state we have the appointment and allocation of portfolios. Example 3 creates a problem where are suggesting that in the event that there is no party that has the majority, the president will be hamstrung in terms of formulating a policy and then subjecting the ministers to a policy which the president then formulates. The question of policy formulation must be separated from the question of appointment and the allocation of portfolios. The policies must be dome subsequent to the allocation of portfolios, through whatever the method the president might decide, because it might be necessary if there is a party without a clear majority that there might be a compromise as far as policies are concerned. My suggestion is that we go for example 2 and exclude at this stage the question of policy formulation.

We would favour 2, the final sentence in the comment says it strengthens the hand of the president and lessons the risk of deadlocks over the allocation of portfolios. But would like to add 3 because it is the same as 2 with an extension. We read the comment under 3, this makes the cabinet and its policy directly accountable to parliament and requires the government and individual minsters to adopt and implement policies that have been approved by parliament. Sop the combination of the two allows the president power and strengthens his hand in the allocation of portfolios but equally it makes the cabinet collectively responsible to parliament and we believe that 3 which is a combination of 2 and 3 gives the correct balance between the right of the president on the one hand and accountability on the other.

The DPâ\200\231s proposal is that 2 and 3 can be combined.

Can I ask the DP a question of how they will dissolve in the event that we do not have a party with a specific majority? You might find a coalition which party is the president going to implement.

This comes from the technical committees report and the question should be directed to the committee I am just approving their report. You are dealing with a cabinet you are taking decisions on the basis of the majority, but you have to take decisions within the context of an overall policy thatâ\200\231s approved by parliament.

Maybe it will be useful to say a few things about the formulation and the usage of policy guidelines and so on.

Dr Venter:

Chair:

Dr Rajah:
Chair:

Mr Moseneke:

Mr Chaskalson:

tape ends

There must be some basis for cooperation between the different parties

in the cabinet and one way to do this is to formulate in the process of formation of government by some means - policy guidelines and possibly have these approved by the parliament and hold cabinet accountable in terms of those policy guidelines as the cabinet governs.

Very often in the normal formation of coalitions thatâ\200\231s the way it is-done. The majority party initiated the formulation of such a policy its

negotiated with other parties, thereby laying the foundation for coming

into a coalition government and taking part in it. Then also making it

clear to the public and to parliament on the basis of that government

is. That could also be a means to provide the decision making process

in cabinet. If you have something objective and clearly defined such

as policy guidelines that could be the basis for continuous participation

of the parties in the government.

So the policy guidelines would help the problem of having a cabinet thatâ\200\231s proportionally appointed as well.

Policy formulation must be separated from appointment
Technical committee, on the input by Dr Rajah?

Example 3 uses guidelines as a specific mechanism, to put together a

cabinet. So in that instance you cannot separate them. If you go

through it step by step you will see what the proposal amounts to.

8.5.1 The prime minister formulates in broad terms policy that the government will follow. Implicit therein is that some minister may not

be able to live with that policy and would therefore opt not to get into

that cabinet or would influence a formulation of that policy by saying

I will come in provided you put A,B and C and delete X,Y Z. That

will enforce bargaining in the formulation of the guidelines. In 3 in

some cases in natural coalitions you might have to get the approval of parliament in certain cases it would be an indication of the amount of consensus you have managed to build around the policy guidelines. If parliament rejects it that may be the initial test as a cabinet and you

may have to dissolve. So what I am saying is that policy guidelines are

used as a mechanism to out a cabinet together.

So the president together with the minister elect formulates a policy, the policy goes to parliament, the parliament approves of the policy and then only the ministers are formally appointed because then they give their approval to the policy. So until such time the policy is approved by parliament I presume the minsters are not appointed. The are merely consulted.

You can do it in a number of different ways. But the conventional

DR Rajah:

Dr Venter:

Mr Landers:

Dr Venter:

Chair:

ways of doing it is that you put together a cabinet. That cabinet has to have a policy so it has to address the main aspects of what its policy would be and what the main thrusts of the portfolios would be. Once you have composed the cabinet you then say well, heres my cabinet and heres my policy and I put it to parliament. If it doesnâ\200\231t get its vote than that cabinet is out and you have got to try again. Technically whether the cabinet minister holds office on when that cabinet minister holds office, there is no reason why that minister should not come into office immediately but it requires the approval of parliament, if you do not get the approval than you dissolve the cabinet. Thatâ\200\231s not an uncommon feature of ordinary voluntary coalitions. You bargain o the policy of your coalition government, you go to parliament to get the necessary approval, than you govern until you lose that approval and than your coalition collapses and you start again.

If through a deadlock cabinet is dissolved than I presume that the cabinet ministers would have deemed to have resigned their seats in parliament.

No, the participation in cabinet would not be that directly linked to being a member of parliament. if a specific party cant live with a change of policy or the continuation of a policy by the cabinet, it can leave the cabinet and go back to parliament. ;

We are still looking at the question on the table regarding the appointment, we have had a few supporters for example 2 where the president will be appointing the members of the cabinet, it also suggests the allocations of portfolios, I.am not sure whether its in or after consultation with various parties, than we are taking about example 3 which includes policy guidelines. I am not clear. I would like guidelines from the council where they want to go with this proposal. :

We seem to be close to it but there seems to be a need for a little more thought to be given to this which is an important aspect of the constitution, could I suggest that we allow this one to stand down?

I think it would be excellent after this discussion, no decision is made but it could lay the basis or further discussion.

Right, there is some consensus growing out of here, where we go to from here, we will see the next report coming back.Agreed?

Agreed. ;

Thank You, that completes the discussion of the 11th report. Mr Gordan has suggested that Mrs Jajula take his place while he goes

to a meeting. Agreed?
Agreed.

Tea.

Mr Moseneke and Mr Ngoepe presented the 12th report of the technical committee. What follows is the debate and decisions agreed to.

Chair:

Mr Landers:

Mr Rajbansi:

Mr Hettasani:

Thank you. A very thorough explanation of the report. You started off by telling us the powers are going to be extensive, that as you were proposing separation from the appellate division. Its a lot for us to digest and all the discussion points that have been set out in the agenda will come back to the report and the addendum. Can we move on to the questions to be debated and if anyone has got questions to be clarified they can follow it up,in the debate.We start off with A. Should the constitutional court be a separate court or an integral part of the ordinary curt structures or should a hybrid system be developed?We are going back to the original proposals and alternatives that were offered and asking for guidance from the council.

We want to congratulate the technical committee for their excellent report. This is one of the best reports that this council has received from any of the technical committees and allows the council to make a clear and informed choice. With regard to wether the constitutional court should be separate, on behalf of the Labour Party we believe that the constitutional court has to be separate. It is important that it should be separate of other courts that its independence from the legislature and the executive must also be clearly spelt out in the constitution. We welcome the proposals and recommendations and contained in paragraph 3.5. As well as paragraph 3.7 (c), we want to endorse what is contained in paragraph 3.7 (d) which says that it should therefore be established as a separate curt and not as part of the appellate division.

We also want to compliment the committee. It is our view that this report should be given a five star rating. We are of the view that the constitutional court should be a separate court.

We also go along with the idea that the constitutional court should be a separate body because of the of the immense power that this court is going to carry and in order that there shouldâ\200\231nt be any confusion which will cause delays and expense on the ordinary people who would like to have access to this court and that this court should remain accessible to those who have genuine constitutional matters to be dealt with and therefore the constitutional court should be kept apart.

Want to align myself with the sentiments of Mr Landers and want to support the separate constitutional court for the reasons which Mr

Mrs Tshabalala:

Mr Desai:

Dr Venter:

Mr Chaskalson:

Mr Moseneke:

Mr Eglin:

Landerâ\200\231s stated. To add the constitution now becomes the supreme law of the country. We are now also entering into a new culture and it is important that we establish that culture from the beginning especially now that we have a bill of rights etc.

My party will support the idea of having a c separate constitutional court because we have got a feeling that this will deal with matters that effect the functioning of the state and will ensure that checks and balances are maintained.

We support a separate court. But is this court going to be appointed under this interim constitution. Does the technical committee envisage a properly constituted assembly who then adopts a new constitution will have the powers to appoint a new court?

One of the difficulties that we had to consider is the security of tenure of members of such a court. It will be subject to the decision of the constitutional assembly. There would be cogent arguments for such a constitutional assembly to continue such appointments but it will not be possible to put that in the constitution for the period of the transition because this constitution will not survive the work of the constitutional assembly. It cannot therefore be provided in this constitution that term of office of the constitutional court will exceed the life of the constitution.

It would also put the judges of the constitutional court in no different position to any other judges. One cant in this constitution guarantee that the constitutional assembly will necessarily adopt a court system which will give security to the existing judges.

They would also be in no different position than any other civil servant. It means that all persons who are incumbents in the sense that they would be holding one position or the other which is not depending on the electoral process, would be ins structures that may or not survive the new constitution and we haveâ\200\231nt expressed this in our report but this obvious need for a certain level of security of tenure of all judges, to make sure that they retain their independence throughout, that is an important consideration that the council may want to weigh in the process of debate.

The DP accepts the principle of a separate constitutional court. But as we go on I hope that other than this which could be a fundamental decision to have a separate court that we do not take definitive decisions in the sense that there are a number of people who are still studying this document and there are specific inputs being made to the technical committee and we would like to see their reaction on matters of detail. Because on the issue of a separate court it is an issue which we could decide but beyond that we can discuss but not take decisions until we have seen the input from the other people.

Mr Cilliers:

Dr Venter:

Can we agree that we can take decisions in principle but there other people that are still going to make inputs and we might have to revisit some of the aspects of our decisions. Agreed?

Agreed. Everybody that has spoken thus far, there has been general agreement with the principle of a separate court, is that agreed?

Agreed. Can we move on to B. Should the constitutional court be a part of or separate from the appellate division?

Separate?
Does everybody accept that we donâ\200\231t have to go into that ?
The proposals of the judges of the appellate division in this regard are important on this question and we have not had an opportunity of studying that.
Shall we leave it as Mr Eglin has said. In general principle it seems thaT the house is agreeing with that but if

something should come up we can revisit these issues?

Agreed.

Paragraph C. What should the ambit of the jurisdiction of the constitutional court be?

I want clarity on what issue and that is there is significant reference to disputes between organs of state and disputes between different levels of government and on the addendum disputes between organs of the state and levels of government, it could well be that the bill of rights will go beyond disputes between organs of state, could have disputes between individuals and individuals in relation to fundamental human rights would that category of disputes also fall under the jurisdiction of these courts?

The answer would depend on the wording of the fundamental rights in the constitution wether there will be horizontal effect of those fundamental rights. I am not sure wether thatâ\200\231s being clarified yet. Should that be the case, certainly that will form part of the jurisdiction of the constitutional court.

Addendum 12, 87.2,(a), it talks about the anticipated violation of any fundamental rights, we can get ourselves in a tangle by judging what is an anticipated violation, its like trying to arrest a person for an anticipated crime, he may not have any intention of violating anything at all, but if we are to give the courts any authority on anticipated violation we might be transgressing the individuals rights.

Mr Moseneke:

Mr Landers :

With respect to Dr Rajah, its fairly common place that may violations are impending violations or threatened violations. I shall kill you. You are perfectly entitled to run to court and say Mr Cronje says he will kill me and the court will say that that is an impending threat to your right to bodily integrity and it will order Mr Cronje not to kill you. That is an anticipated or threatened violation.

In general, are we suggesting then that how the technical committee has framed the ambit of this court is that accepted?

Agreed.

The next paragraph D. How should laws contrary to the constitution be dealt with?

No Comments? Are you happy with the approach of the technical committee?

Agreed.
Paragraph e. Should a procedure be provided for in terms of which the constitutional court can be approached to give an opinion on the

constitutionality of a bill before it becomes law?

In d. the technical committee has gives us two options. Council could accept one of the two.

Chair: Would you like to resist that, paragraph 5.2 and 5.3?

Mr Moseneke:

Mr Moosa:

The question that calls for a decision there is whether the consequences of declaring a piece of legislation invalid should be prospective or also retrospective? As you would imagine, once a statute is declared invalid, in 5.3 such invalidity would amount to nullity but certain things would have been done under that statute. And certain rights may have vested under that statute which the court now declares to be invalid and some people contend that whatever would have been done under that act would be a nullity and therefore no real rights would have vested and these amy be rights such as property rights etc. So it may well be that this council will say that even where a statute is

" declared to be a nullity , the consequences therefrom will only be

prospective and whatever rights and acts that have been done would be protected as rights. That is the question that we sought guidance on.

On page 2 of the addendum you did set put how you perceived that and I presumed that that was how the council was agreeing with that proposal there?

You are quite correct, when we said agreed we were really referring to 87.4 and 87.5 because there it has been set out clearly to the

Dr Venter:

Mr Desai:

Mr Landers:

Chair:

Mr Hettasani:

Mr Chaskalson:

satisfaction of the council.

If you would like to revisit that just to make sure? The technical committee has responded to their own question, what they are asking is do we agree with the way they have responded to their own question?

A question with regard to 5(a) where it says that its shall not invalidate anything done in terms thereof... one example we know that as far as land is concerned there have been bills which have dispossessed people of the land. Assuming that the court declares that such a bill is now invalid, we are suggesting that any action taken in terms of the bill shall not be invalid, the individual shall have no claim to the land although the bill is invalid. There is no possibility of the... of the injustice done as a consequence of the act being invalidated.

In subsection 5 starts with the words: unless the constitutional court in the interest of justice and good government orders otherwise, its not an absolute provision that shall things will continue validly, the court may under circumstances find that it is not tenable to retain the validity of such actions.

The technical committee has answered their own question in 5 and its a sensible way of looking at the issue.

I was going to agree with Mr Desai, we need to give this serious consideration, so Mr Eglinâ\200\231s proposal to resist comes into play here, there are serious consequences when it comes to the question of reparation and restitution.

So you want to think that through a little further.

I am looking at 5.3 ...Does it mean that if someone staying in these national states really identifies a certain laws which he feels is contrary to the constitution has he no recourse to the law. Is this fair?

There are two separate situations. Laws which were passed before the new constitution came into force will have been valid because of the adoption of parliamentary supremacy. So there can be no question of declaring them invalid for any time before the date of the coming into force of the new constitution. But after the new constitution has come into force there may be a time lag between the date of coming into force of the new constitution and matters being brought to court. That time lag may arise for various reasons, possibly because people haveâ\200\231nt identified their rights and it may be a year or two before matters get before the courts. In the mean time the old legislation which passed through parliaments without regard to the requirements of constitutionality will still be under the statute and things being done under them until someone brings them to the court or until parliament

Mr Desai:

Mr Chaskalson:

Mr Moseneke:

Dr Rajah:

Mr Landers:

picks up the error and corrects it. It in regard to those particularly that troublesome situations can arise. In the examples given certainly on the day after the coming into force of the constitution somebody identifies an unconstitutional action or piece of legislation, that person can go to court immediately and seek relief and the court will in units discretion will decide what will be an appropriated order but it may have to pout the parliament on time to remedy matters. Take an example what happened in the USA when the question of segregation came before - the ours, it came at the time when all the schools in the South were segregated. What the American court was put the schooling system on terms to rectify that situation. It may or may not have been successful in its order. But it said desegregate with all deliberate speed. It did not close own all schools on the ground that the schools were functioning illegally. Its that sort of situation which is a big situation, its one upon which layers disagree. There are people who say if it is a nullity than its always a nullity and you cant give validity to it. there are others who say that once the Act has been completed you cant undo it and there are some that what ever happens there should be a discretion. Its not an easy matter.

Mr Landers is worried, I hope that I havent agreed to something I didnâ\200\231t intend to. My understanding is that issues which arise under the new constitution are issues which the court will cease itself of ant issues of past grievances? Am I right?

It can only deal with matters that arise under a new constitution. It cant say that a year before the constitution came into force there were ceratin actions which can retrospectively be declared invalid, because at time they were valid and will remain valid until such time that the new constitution comes into force. Its really in regard to the laws and actions which are undertaken from the date of coming into force of the new constitution but you do get retrospectivity arising there because the matter doesnâ\200\231t come into court on day 1 and it could take a long time before matters come to court or even noticed.

I agree with my colleague. You may find laws that will linger behind their welcome and those laws may be a basis for approaching court to strike those laws down and that point we do make under 5.3. What we are dealing with is the discretion which the court will have in dealing with that complex situation.

On 5(a,b) refers to laws on the commencement and laws after the commencement of the constitution.

On page 12 of the report where they recommend that the constitutional court, if desired by this council to give it the power to put legislatures on terms to remedy the defects in legislation. What the technical committee is saying do we require such a provision and if so can they go ahead and put it into the draft. We as a council must give that

Dr venter:

Chair:

Mr Moosa:

Dr Venter:

Mr Cronje:

Mr Chaskalson:

consideration and arising from the debate here it would seem that such a remedy would be necessary.

Maybe there are two things that are mixed in the discussion. We will come to 5.4 which deals with the legislative process and possible opinion given by the constitutional court after the legislative process. We have in the draft already dealt with the possibility of putting the legislature on terms in section 87.4. I would like to pint out something else. You will note that in question D. there is a reference to other sections, 90 and 91. On 90 there is a typographical error, 90 (4) it should be subject to the provisions of the constitution, (not court), but the substantive point is that one should note that that provision grants the SPR divisions of the Supreme court the jurisdiction to invalidate SPR legislation but not parliamentary legislation. We have said that it may also be necessary to provide for some procedures for the SPR divisions regarding what they can do with matters that they find are unconstitutional as we did in section 87 for the constitutional court. We want to give notice that we will consider that later on.

While you are on 90.4-7 and nobody has really discussed this question. Does anybody want to make an input there?

We agree with it but I wold like clarity on 94 (c) which says that an SPR division of the supreme court will have jurisdiction as far as the constitutionality of executive and administrative conduct of all organs of the state is concerned. Would that not bring that the problem of 7?? would you not want say that it should be limited to SPR matters rather than say central government or parliament.

On must keep in mind that there will be one national court of appeal regarding constitutional nature, that will be the constitutional court. That provision involves all the court in the adjudication of the constitutionality of executive actions but appeal will lie to the constitutional court.

Clause 93, the fact that on cannot appeal from the constitutional court to the appellate division, does that not put the president of the constitutional court in a stronger position than the chief justice? because if the chief justice has no jurisdiction over the findings of the constitutional court?

It does not put the constitutional court in any superior position to the appellate division it just defines the field in which they shall have power and what it in effect is saying is that in all matters other than constitutional matters the appellate division shall be the final court of appeal and that will presumably be the bulk of litigation in this country. Hut in regard to constitutional matters the constitutional court will the court of final appeal. its precisely to avoid that hierarchical

Chair:

Mr Titus:

Dr Venter:

Chair:

Mr Ngoepe:

Mr Moseneke:

Dr Venter:

conflict that we say the appellate division should have no jurisdiction.

I think that goes back to paragraph B. where we did say we agree with the constitutional court being separate from the appellate division.

With regard to 90.4 (a) where an exception is made with regard to an act of parliament, is that meant to refer t the central legislature or to. the SPR legislature. â\200\231 y

Parliament is intended to mean the national parliament. The draft chapters that you have before you there is no reference to parliament in the context of SPRs. The SPR supreme courts should not have jurisdiction to declare parliamentary legislation invalid.

In discussing this issue there are quite a few questions that may still be coming as people look at this in detail.

With regard to 94 (a) on the question relating to lack of jurisdiction on the part of SPRs supreme court to declare invalid acts of parliament. The idea was that that should be the preserve rather for the constitutional court because you might end up with as many SPR jurisdictions as there are SPRs and if one of the SPR courts declares a national act invalid, you would remain with the act being valid in the remaining SPRs and that would create a awkward situation nationally.

It is logical that state cannot question the act of parliament. How do you address an act of parliament when there is concurrent powers? Will the court in the SPR division have no jurisdiction in the event of those laws?

The test seems to be what is the origin of a a particular legislation. if its act of parliament than the constitution is quite clear in regard to ho has the power to render it invalid. If its a law made by an SPR the Supreme court will have the power to strike it down.

About the supreme court that will be adjudication on constitutional matters, will they have ancillary powers to cost of actions flowing from the determination of constitutional issues, or would the person have to go back to the ordinary supreme court for finalisation?

Subsection 7 of 87, the constitutional court may in respect of proceedings before it make such order as to courts as it may deem just and equitable in the circumstances.

In 94 (a)...

tape ends

Mr Desai:

Mr Wichers:

Mr Desai:

Mr Wiechers:

Prof Devenish:

I think we have exhausted all the questions relating to paragraph d. In general the house seems to happy with the direction that technical committee is going but would like to revisit. Do I get agreement that the technical committee is going in the right direction?

Agreed.
Paragraph E?

I am not opposed to opinions being given before a bill becomes law but I am concerned about the judiciary would usurp the function of the legislature and that perhaps in given an opinion they wont take into account the fill consequences of the acts that the legislature wishes to remedy.

This question of testing laws by parliament by a court is an internal question whether the judges then assume powers of law making. but if you look closely its not true. What the judges can do at most is to declare certain laws to be against the constitution, the constitution is a law, so the judges are not creating new laws they give effect to existing law. They donâ\200\231t substitute their own opinions for the legislature, they cannot become law makers, they can just say that the existing law is not being abided with. So the question is are they then becoming law makers, they cant because the law has been made.

We are dealing with an opinion not the law.

Its an opinion on a law in the process of being created. So instead of wanting for a law to be passed this is a shortcut to give an opinion on the constitutionality of a law in the making. The court is not going to substitute its own terms of that bill and say you must make it this way. They could say that if you carry on with this clause in this bill than eventually it will not be in conformity with the constitution.

The role of the constitutional judges in this regard is to some extent controversial. if one looks ta the American experience that the striking down of laws has proved to be controversial, but what we have to understand that it is the function of the constitutional court to uphold the higher law, the constitution is nit just a Iw it is the highest law, the supreme law so that the judges that are performing this function are not violating the separation of powers they are upholding the laws. With regard to the action of the court in regard to bills, this is necessary because it is a drastic thing for the courts to strike down law, to prevent the possibility of that occurring it may be a good idea the opportunity of giving an opinion of the bill and informing the legislature that in their opinion this bill should it become law will violate the constitution and that will prevent the possibility of a constitutional crisis when an actual law is invalidated.

Dr Venter:

Mr Moosa:

Mr Eglin:

We have not formulated anything in the addendum to this effect, in 5.4 of the report we set out the considerations especially at the end. We set out three different consideration. It involves a kind of procedure that one finds in some jurisdictions especially in France and to certain extent in Germany where the constitutional court is involved in the process where prior to legislation coming into operation expressing the viability of such proposed legislation in terms of the constitution and this is something that should not be decided upon immediately but could profitably form the basis of further discussion.

On 2 of the constitutional principles where it says the constitution shall be the supreme law of the land unlike what we have at present where parliament is supreme, we must also accept them it is the courts which will declare whether that law is valid or invalid , the same pertains in the USA where the court can declare a law invalid unlike the present situation where only parliament can change laws. On 5.4 the preference is for the first astrix.

I would like to say that we wouldnt like to see in any court involved in the legislative process notwithstanding what Dr Rajah has said. There may be special circumstances where you would want the opinion of the constitutional court, in the normal course of the legislative process, whoever is introducing bills to parliament would want to obtain opinions from its own legal council as to whether or not that bill is in conformity with the constitution.One of the suggestion here is that a certain minority in either of the houses of parliament or both houses of parliament should be able to refer the matter to the court and you could have an abuse of the whole system where the constitutional court gets drawn into the work of parliament. So there should be a narrow restriction. There may be circumstances but it should then be left to the executive or the head of state to determine whether or not an opinion should be sought and at what point that opinion should be sought in the legislative process. But I would be opposed to having too many of these other provisions, because it can lead to the abuse of the courts and a narrowing of the separation between the judiciary and the legislature.

If we are going to live in a constitutional sate where the constitution is the supreme law, that any accts of anybody including parliament that is in conflict with the constitution should be capable of being struck down by the constitutional court. the question here is should there be a prior referral. I think the onus of a prior referral would be on the person who is introducing it, might well to et a prior referral in order to be satisfied that should it go through parliament it wont be struck down as opposed to saying that parliament should in the course of its activity get a prior decision on this matter. But if its going to be left to members of parliament and I want to raise this in the context that some of the bills that will be considered will for instance be the new constitution and some of the bills require a two thirds majority to be

Mr Cronje:

Mr Cilliers:

Prof Devenish:

Mr Mahlangu:

passed and it ill be wrong if a bill has to be passed by a two thirds majority to say that a one third minority can go to court because if its passed by a two thirds majority there will in fact not be a one third minority available.

I do not read this to mean that the constitutional court by its own volition interferes with the legislative making process. What I do see and its a benefit that so be so, I know of few governments who have not made mistakes in legislation and its a costly affair for someone to challenge that legislation through legal procedure to have legislation set aside because its contract to the constitution. As this law is drafted units a precaution that if there is any doubt in the minds of substantial members in parliament that before the bill is affected to test that the bill is in conformity with the constitution, and that will only occur when there is doubt, so this will only be seldom done, so its something to be welcomes. if you can avoid a situation where subsequent to the enactment of that bill through a court of law where you can deal with it before you make that mistake than this is a proper way to deal with it.

I would like to associate myself with MR Cronje I differ with Mr Moosa in this regard, Mr Moosa has said that this should be a narrow restriction if something like this were to be introduced, this prior action by the constitutional court, he described it as an abuse of the court. I donâ\200\231t see it as a narrowing of separation of powers, I see it as a check and balance. From our own history we know that we had this serious situation of the coloured vote cases dragging through the appellate division where acts of parliament were attacked, this would obviate this type of situation, so I would propose that this matter has merit, but the ambit of ii can be restricted. I would propose that it should be sent to the technical committee in accordance with their statement in 5.4, to come back to us.

The term separation of power has been used. There is a certain amount of misunderstanding. In no constitution in any country in the world is there an absolute separation of powers. The late Prof matthew described the phenomenon more correctly: When we talk about the separation of powers we are talking more about separate institutions sharing powers so that we find that the courts do have some say on legislation which is the main preserve of the legislatures and that in so doing although they have a minor say on legislation they have checks and balances and it is this that one finds a guarantee of freedom and that the constitution works properly. We must bear in mind that there is no such thing as absolute separation of powers and weâ\200\231ll we have is separate institutions sharing powers.

If one can strike the last astrix and leave only the first two so that you have the option to the head of state because the other people can follow the normal channels in the court of law or the constitutional

Mr Desai:

Dr Venter:

court if they feel they are aggrieved, because the head of state will only take it to the constitutional court when he is not sure. But to open it to any minority in parliament to take it to parliament when they are not happy with the voting you will have a lot of filibustering. If its left to the head of state when in doubt it will be more sensible.

We have interesting discussion on this topic. But following on Prof Colliers proposal, its clear that there is some general agreement that a procedure should be provided for in terms of which the constitutional court can be approached to give an opinion on the constitutionality of a bill before it becomes law. Mr Moosa has had some reservations. Also about the minority clause on page 12 there have been some questions raised. But do I agreement from the house that the technical committee should go ahead and come up with proposals for the clauses to be included in the constitution.

Agreed.

We can then precede to paragraph f. What should the qualifications of the judges of the constitutional court be and how should they be appointed?

Suitably qualified should. be appointed but because of the jaundiced nature of the bench in this country and the fact that there has been historical disadvantage in practising law of gaining experiences as judges the PAC would proposal that the practising advocate , hat his qualification should be brought down to five years. We have to get to the beginnings of a new bench that represents the people of this country as far as possible. We know it is difficult to train a person for such a post over a short period of time. But we must look at the imbalance. We have no objection to the appointment in camera but we also have the problem with the committee in parliament having to be unanimous on the appointment. We would like to know why the committee insists on a unanimous appointment when they quote examples in other countries where two thirds have sufficed.

In the first place in subsection 4 provided for a deadlock breaking mechanism if unanimity is not possible. But the logic behind this is that in a multi party joint standing committee of parliament it would be much more probable that you can reach unanimity than for example in a large public body such as parliament. there is also the procedure of interviewing and its not a matter of necessarily a limited number of people to be interviewed. It should be a legitimate process with multi

Mr Cronje:

Dr Venter:

Mr Chaskalson:

party input and we thought that since the constitutional court is such an extremely important body or will be in terms of the constitutional dispensation, the full legitimacy and acceptability to as many parties as possible is a necessity.

I have understanding for the background in terms of which the

technical committee has made its recommendations and the point that

has been made by an earlier input in respect of the composition of - those to appoint the constitutional court. In par 7.4 it is said that

normally a judicial service commission is used for the appointment of judges to ensure that the appointment are those of suitably qualified

persons and of minimising political influence of such appointments.

There are two sides to it. But bearing in mind that the constitutional

court is the one that will judge and certify that that the final

constitution is in conformity with the constitutional principles and

ensuring that any bill or act passed is not in conflict with the

constitution itself. Are there not inherent dangers that members of the

constitutional court are appointed by politicians.

There are various ways of going about the appointment of judges, the Judicial service commission would be largely a body composed from the legal profession , in the appointment of especially constitutional court it is inevitable there will be the political instinct to influence those appointments. WE thought it will be better to do this openly on political terms but in such a manner you achieve a political balance.

This is nothing new. There are countries which have developed a system in which the different parties in parliament actually nominate and achieve a kind of a balance by alternating those nominations on a apolitical basis. It works well because you remove the suspicion that this thing has been manipulated politically when you do it openly on a apolitical basis.

We have given 14 examples in this document. You will see that the great majority of those leave it to the executive or to parliament or to a combination of both. We have introduced the idea of a judicial service commission into the appointment of judges who are not going to serve on the constitutional court. It is a fairly recent development, the idea of this commission, there are not many but a number of countries which have adopted this procedure. And the composition of the

judicial service commission varies from country to country., In some the executive have more say than the judiciary. In others the judiciary has more say than the executive. But t he idea was to get a slate that was acceptable to everybody.Since you start on the basis that you have got get some form of consensus from parliament, at the end of the day you will get a broad base constitutional court which is not as it were the creation of one participant. th e danger is that in the creation of the slate you may lose some of the best members, that is a hazard and one must bear that in mind. So there is no such thing as a perfect member of

appointment.

Mrs?7?"

Pfof Wiechers:

Prof Devenish:

Mr Moosa:

On the appointment of judges on 88.2 its says that no person shall be qualified to be appointment judge of the constitutional court unless he or she be a fit and proper person. Is the fitness refer to physical fitness?

Fit in everyway....phyically, mentally fit. back to the question of Mr rowan, the judges of the constitutional court will be appointed by parliament., the reason they must be qualified, judges, but the-basic reason isa that they have the confidence of parliament because they are going to be the??? and protectors of the constitution and it will be a sad day if there are judges in the constitutional court who do not have the confidence of parliament because they are going to judge over and adjudicate on parliamentary matters. For that reason you must have that legitimacy from parliament itself.

On the fit and proper, if we are to paraphrase that what ut really means is that persons who are eligible have to be competent and persons of integrity.

The phrase fit and proper person has in the course of our legal history acquired a certain meaning and it is commonly used with regard to the admissions of advocates and attorneys, so it has a acquired a certain technical meaning and we understand that when it comes to applying these criteria it will be against the background of that established meaning which is more or less what Prof Devenish has said.

My first point is on 88.2 (c)The cumulative period for which the prospective candidate should have been qualified as an advocate should be five years and nit ten years for the reasons Mr Desai had given. the second point I would like to raise is on the size of the court. It appears from this that the court will be made up of 11 people. is this not extraordinarily large size for a constitutional court. Why has the technical committee opted for what appears to be a big number? I amy be wrong there. As far as the appointment of the president of the constitutional court is concerned, we would like to suggest that there be a different procedure for the appointment of the judges who would service on the constitutional court and for the appointment of the president. That the president of the constitutional court should be appointed by the head of state after consultation with the joint standing committee.It would be the head of state who would make the appointment of the president of the constitutional court. i would like the technical committee to consider that. The other matter relates to whether or not the prospective judges should be interviewed in camera or not. The arguments which have been pout forward by the committee are that we will not attract the best people to become members of the constitutional court if they are to be interviewed not in camera and that there would be awkwardness and they would be reluctant to become

Dr Venter:

members of the constitutional court. the committee has mentioned that there are examples elsewhere in the world where hearings are public and I donâ\200\231t think that a person who fears public exposure of something would really be a fit and proper person to be a member of or judge of the constitutional court. Judges should presumably be completely free about being asked any question about themselves by anybody. if they do have something that would make them feel awkward in a public hearing than perhaps they shouldnt be judges of the constitutional court. the deadlock breaking mechanism in 88.4 it says there if the joint standing committee is unable to reach unanimity what would then happen is that 75% of the members of the committee would appoint 8 of the judges and that two remaining judges would be appointed by 25% of the members of the committee. We should remind ourselves of the composition of the joint standing committee. The committee is composed of one person from each of the political parties represented in parliament regardless of the number of members that party has in parliament. So you could well have about 6 or 8 patties who have 5 and half percent of the seats in parliament or even less and they would then dominate this joint standing committee. I donâ\200\231t if this has been done but is it possible that you could have quite a skewed situation ending up there. Would it not be better, if we are to say that a specified majority, I donâ\200\231t think it should be 75%, that the members of the committee should represent 75% of the members of parliament. That those who represent 75% of the members of parliament would appoint 8 of the judges and those who represent 25% of the members of parliament would appoint 2 of the judges. The other related matter is why do we have the fraction 75% and 25%? Why not two thirds and one third?

Many of those questions I would think should be dealt with politically. But regarding one matter, the size of the court. there is nothing magic in the number 11 but its been so for some time in or own judicial history. That the closest equivalent that we have had to a constitutional court is a bench of 11. One would also expect the joint standing committee to consider a wide spectrum of the community to be represented in such a court and there are so many consideration to be taken into account, gender race etc, that the smaller you make a court the more difficult it would be to satisfy those non discriminatory considerations. You may have noticed that we have designed the provisions in such a manner that we require all the members of the court to be involved in all the decisions. There are good reasons for that as well. We thought that 11 would be quite practical on the one hand and not that difficult to achieve. The reason for having the full bench involved in all the cases before it would be to avoid the possibility of the bench being composed in a specific manner for specific kinds of cases, in order to avoid possible manipulation of the outcome of judges and lastly one would like to,pint out that there constitutional courts in the world where you have more than one

Prof Devenish:

Mr Rajbansi:

chamber or senate as they are sometimes called consisting of a number of judges so this wouldâ\200\231nt be exorbitantly large.

As far as the composition of the court is concerned, because the constitutional principles do not apply here, the constitutional principles

bind the constitutional assembly in the drafting of the new constitution,

perhaps we need to say that the joint standing committee in making its

nominations should have due regard to for gender composition of the - population, a general statement, perhaps some sort of guide there

which would compel the joint committee to consider the matter

seriously.

If we look at the retirement for 10 years, what motivated us in this regard is that the task of the constitutional judge is going to be a demanding one, it will require experience and wisdom and that is why we have put in the 10 year period because we thought it was necessary to have that experience. Also the ten years requirement will give the court a legitimacy which is going to be important. Inn the report we have strived to make it possible for this constitutional court to be representative of the entire South African nation. We will have to weigh up the pros and cons and it will also be necessary to ensure that this is a court which has legitimacy. In regard to the question of 11. The number 11 is going to permit a spectrum of experience and representatives. It will be possible to appoint people from our society which would represent variety and richness which would not be the position if we are going to have four or five.

There are a number of issues which are floating around, the ten or five years, the in camera, the deadlock breaking mechanism, the size of the court, the gender issue. Should we came back to that and go through each paragraph of 88.

The proposal I want to make is in respect of 88.2 (c)..tape end you indicated that a person shall have 10 years after having qualified, practised as an attorney, lectured in law. There are those who have extensive experience other than practising as an advocate or attorney or other than being a lecturer. There may be researchers in law for 10-15 years highly able and experienced. Recently there are members of the technical committee who have been involved in the administration of justice, they have been fit to serve in our technical committee, therefore 1 want to suggest that the technical committee consider people belonging in this category. Let us not regard persons for example, we have persons int his council capable persons who are involved in legal persons, in state administrations, what about magistrates, we know that they have been tainted, but we do have capable magistrates who are qualified to be advocates who have the necessary qualifications. So the technical committee should broaden the arena as far as 82.2 is concerned. Then I want to look at 88.3 (a) and ask for clarification on the word unanimously, is it unanimous of the

Dr Venter:

Mr Landers:

total membership of the joint standing committee or of those who are present at the time of the decision relating to the selection of appointment.

Regarding the first part of the question, we think that par 2 (d) deals with that. We should keep in mind that what was intended here was that the qualifications required would be a,b, and c or a,b,and d. D would include everybody in the category which Mr Rajbansi has mentioned. Anonymously in 3 (a) is not specified whether its intended to be those present or the total number of members on the interpretation of it as its stands. I would say that it would mean every member.

Do you want to add something that isâ\200\231nt here or should be go through it clause by clause.

We support 88.2 (c) we support the view that experience should be limited to five years because in the med it is not the length of the years but the quality of the experience.secondly the question of camera, we advocate a policy of openness, we see no reason why it should be held publicly to gain the confidence of court. As far as the composition of the selection panel is concerned, instead of saying one member of every party there should also be a proportionality of the parties represented in parliament. We should look at the composition in terms of the strengths of parties in parliament and I want to suggest that I feel uncomfortable that judges should be interviewed entirely by politicians, whether it is not possible to include in that panel some individual outside of the political arena in the field of law, local or some international individual who can add a little more independence to the process of section rather than viewing the process as a political one. As far as section is concerned, the clause does not say anything about the composition of the constitutional court. I would read into that that a bench can be composed of 7 people, any one of the 11 or any 7 of the 11 may constitute the bench. So all we are talking of here is the totality of the numbers that form the court not necessarily of the composition of the constitutional court. I share the sentiments expressed by Mr Moosa regarding 75% and 25% because this can v=create further deadlocks it should be a simple majority. I want to suggest on subclause 6 that the vacancies that created on the bench will it not be possible for that vacancy to be filled by the constitutional court itself subject to ratification by the joint standing committee because at some stage we have got to gave some credibility to those who serve on the bench that they are capable of passing judgement of the constitutionality of the law. We must give them some powers to fill the vacancy. : –

The more we discuss this chapter the more we realise that its a complex issue that we are grappling with. I know that the concept of transparency has been largely accepted since the hearings that took

Mr Eglin:

place on the new SABC board. I am in peculiar position in that I donâ\200\231t have a mandate from my position on this point so I cant provide our official position but I would like to sound a word of wording, I would not like to see taking place in SA what is taking p[lace in American senate hearings which have been described by many as a circus. I believe that it would infringe upon the integrity and dignity of this constitutional bench. So we need to be careful about the procedure that we finally agree upon. We would like to see the South African bench as a matter of urgency acquiring a new face, a face that reflects the SA community as a whole. The appointment of the constitutional court is the perfect opportunity, for this reason we also believe that the period contained in subclause 2.c should also be reduced to five years. It would open the range and spectrum of people available to serve on this court. I am given to understand that at present only something like 11 people of colour have the ten year qualification, I may be wrong, if it is so it reduces the number of people who could serve on this court. I also want to say that from the debates and from my reading of this section the decision making majorities of the joint standing committee must be revisited, by way of additional submissions in this council and others. There are problems contained therein. Finally we want to welcome the subclause which says that no debate should be allied. The argument for transparency falls down there. if you say there must be transparency in the standing committee then you are also arguing that this provision must be taken out. if there is transparency in the standing committee then you must also say there should be debate in parliament. If you are saying that the hearings of the standing committee must be held in camera than the logical consequence should be that there should be no debate. So I would assume that those who have argued against the in camera provision are also saying that there should be debate in parliament following on the hearings of the joint standing committee.

The DP has made a number of submissions on this and in the light of the discussions taking place we would make a further written submission to update it. I agree with 1l the arguments that have used about making the bench more representative. I would argue to reduce the years only in respect of advocates and attorneys, who once they are qualified very few deal with constitutional law is not an appropriate way of dealing with the matter but that in fact under d. where there is no time provision you have the right to choose people who are more suitably qualified. So I have an, understanding of that but on the issue of the attorney practising I doubt whether he is going to be more qualified after 5 years of practising. Our problem is a more substantial one. We feel extraordinarily uncomfortable that parliament on its own is going to choose the court which is in fact going o adjudicate inter alia the legislature. In the 1950â\200\231s the legislature chose its court, it chose the high court of parliament, when it was stuck down by the courts they expanded the senate and packed the court with 11 people that they liked. So the concept that the legislature must be the body

Chair:

only which chooses the custodians of the constitutions misplaced. We would argue that while the legislature has a role because it has to reflect political moods there should be a balance between he legislature the executive and possibly judiciary in this selection process. but to say that it is only the politicians who are the people who should chose the highest court of the land, we feel is likely to lead to abuse. The third pint is the unanimous, we donâ\200\231t mind if its in camera, there is a practice if you have a unanimous appointment, its inappropriate to- debate it because you either accept them enbloc or you donâ\200\231t accept them enblock, what you canâ\200\231t do is to start arguing the case against individuals because then there is nothing before you. So while accept that in camera is not something hard and fast, if you are going to go for unanimity you have to accept in enblock. But another problem is whenever ones comes with deadlock breaking mechanics you actually dilute the original intention if the intention is unanimity and if cant get this then the unanimity is irrelevant you cant do something else, than it almost says well while start off with unanimity you might as well go back to your fall back position straightaway. I will therefore prefer something less then unanimity but something which cannot be diluted if you cannot get that process to succeed. So there is a problem about diluting unanimity and then saying thats a fall back position. The last point is linking this clause with the clauses for amending the constitution. I speak from experience because there a government in SA that used and entrenched two thirds provisions to change the constitution, to circumvent almost this very provision, in otherwise how would you compose the judiciary which was going to adjudicate on a law of parliament Therefore I want to know if this is also subject to the normal two thirds or is this like the constitutional principles once it is agreed upon it is inviolate and cannot be changed by a two thirds majority. It would not be appropriate to have a very high percentage like 75% or a unanimity in a clause which can simply be swept away by a simple two thirds majority of the legislature. For all of these reasons I would urge that a time of one or two days be given to all of the participants today to make a further written input so that in fact the technical committee is aware if the whole range of issues which have been raised. :

There is a proposal there are a lot of people wanting to debate many of these issues a lot of them are still cloudy and that maybe some formal submissions on these areas raised will help the technical committee. So if we can bring this to a conclusion. A lot of issues have been raised over qualifications, whether its ten or five years, people have mentioned section d takes into account a certain latitude that doesnâ\200\231t have to be so prescribed, the whole thing of appointment, whether it should be in camera, the deadlock breaking mechanism, the size of the court, we had another proposal relating to gender

Dr de Villiers:

Chairperson:

Mrs Jajula:

Chairperson:

Mr Moseneke:

I think Mr Eglin has put a proposal forward which will assist all of us - instead of raising a number of points, we can do that through a further submission to the Technical Committee and I would support Mr Eglin on that.

Thank you. I think then if we can bring that to a conclusion I think a lot of issues have been raised over qualifications whether itâ\200\231s ten years or five years. People have mentioned Section D which takes into account a certain latitude that doesnâ\200\231t have to be so prescribed. The whole thing of appointment, whether it should be in camera, the deadlock breaking mechanisms, the size of the court. We had another proposal relating to gender, which - I think Mrs Jajula wanted to talk too, so I think I'll just give her an opportunity quickly as we havenâ\200\231t addressed that.

Thank you, Chairperson. The point has been ..

Thank you. So that was also put on the table by Mr Moosa. The choice of the court by the legislature, I think Mr Eglin brought up some historical questions that should make us pause for thought. And also the filling of vacancies. So I think there are a lot of things, and many others still floating there, so letâ\200\231s follow the suggestion the Technical Committee will receive submissions from those who are interested. Is anyone from the Technical Committee wishing to respond? Mr Moseneke.

Chairperson, we naturally would welcome any further inputs on any, indeed, of the matters that have been raised and discussed here. We have made extensive notes and have taken note of the debate. There are two matters just before you draw this to a close, that probably call for mentioning. You would expect that we debate matters extensively before we place them before you. Sometimes piecemeal, point by point. I want to express a view which I think is held by most of my colleagues, and I am saying it in advance without seeking to determine its ultimate fate. There are two matters: the first of these relates to the in camera provision. I just want to leave this in your mind lingering; there is no similar provision in regard to judges of all the other courts. You will note that they get appointed in a process that essentially is in the hands of the Legislature, the Executive, the professions and ... so you would actually

- have constitutional court judges who would have this very

special and comfortable, if you will, treatment in public. And too, the process will be run essentially by persons who will be

Chairperson:

Mr Rajbansi:

there with political agendas and you can well imagine what would be the end of the process. Worse still if you do what Mr Eglin said we should not be doing - to look at individuals and seek to tug at individuals and deal with them. So I am just saying to you its a matter which this Council might want to deal with with a certain measure of caution in deciding whether you are going to have it open or not. And I think I represent the views of all of my colleagues who have asked me to express their concern around having open hearings around judicial appointments. The second point that will call for careful sizing-up, relates to the question of five years or ten years. Itâ\200\231s one that will require a careful balance between the need for representativity, on the one side, and the need obviously for being fit and proper and being capable of dealing with the task before such a constitutional committee. So there will have to be a very careful weighing up of the situations, and I think most people will tell you that in any of the professions where they teach law or they practice law, there are attorneys or advocates after five years most people donâ\200\231t know as much as they should know for a task that would be before them. So I am just again expressing my colleagues view that we should exercise great caution in seeking to reduce the years to five years.

Right. Thank you for that input. I think everybody will consider that when they put in their submissions. I think if we can just keep our eye on the time, we have targeted seven oâ\200\231clock, we have got G(h)on the ordinary courtâ\200\231s questions there to get through. So can we proceed to G - To what extent should the existing court structure be continued or reorganized -

and itâ\200\231s Page 13 of the Twelfth Report and there are also provisions in the addendum. So if everybody can turn to that and we can address that issue. Do I have nay speakers on that topic? Mr Rajbansi.

Madam Chair, I want to suggest to the Technical Committee to review its recommendation in respect of the lower courts - ordinary courts - particularly from the point of view, and I say this notwithstanding the depoliticisation process that has already commenced, that it wag in these ordinary courts where the greatest grievances of the masses, shall I say, lie. And therefore I want to suggest that, also in respect of the appointment of the Magisterial Services Commission, that this matter should be attended to immediately. after the elections. We should not, you know, try to create a situation that radical changes in the ordinary courts should not take place within the

shortest possible time. When I refer to the ordinary courts, I also refer to even the appointment of prosecutors. You know this has been a very, very problematic and a thorny issue for a considerable period of time.

Chairperson: Right. Any comment from the Technical Committee? First Mrs Giba and then Mr Titus.

Mrs Giba: Thank you, Chairperson. Mine is the sort of question needing clarification covered by Point 6.4. I just want to find out from the Technical Committee what appropriate adjustments do they have in mind that they felt had to be given to the Regional Magistrates Court?

Chair, that merely relates to the probability of SPRâ\200\231s being demarcated and it may be that some of the present Regional Magistrates ~ Courts jurisdictions ~ will overlap those demarcations. Its merely territorial jurisdiction.

Mrs Giba: I see. So itâ\200\231s in no way meant that you meant the creation of regional courts from regional courts than present are dealing with people, matters or whatever. You didnâ\200\231t have that in mind?

Chairperson: Right. Mr Titus.

Mr Titus: I would just like to get clarity on three issues, Madam Chair. Firstly, with regard to Clause 96 of the Draft Constitution. It appears that, and this is my own observation and I am subject to correction on this one, that Clause 96 does not take into account the possible alterations which may come about with regard to the territorial jurisdiction of the courts as a result of the new demarcations of the SPRâ\200\231s and I would like the Technical Committee just to address me on that. Secondly, I would like to find out and thirdly, what the position will be with regard to all those outstanding matters, be they civil in character or criminal character, which will have to be dealt with be the new courts. There is nothing on that. This Draft is silent on that. And also it silent on one other important aspect, the future of the |egal profession as such. Thank yaqu.

[am talkjng aboyt attorneys and advocates.

Right. Three questions there relating tp territorial changes, outstanding matters and the future of attorneys which | thought

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Dr Venter:

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Dr Venter:

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Mrs Giba:

Chairperson:

Speaker:

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Madam Chair, Section 96 should be read in conjunction with 90 subsection (1) and 91 subsection (1). 96 really is a transitional provision to maintain order in the judiciary during the period of transition. Sections 90 and 91 in their subsections (1) make it clear that the whole matter will be regulated by legislation and that legislation would be subject to change. In other words the present legislation would be subject to change and that would probably be synchronised:with- the;phasing'in of the SPR dispensation. The question.of theylegaliprÃ©fÃ©ssion: one must keep in mind that this is a constitufionrand!there are so many matters that people are asking questions about - how this going to be dealt with in a new dispensation. WE did not consider, although we didnâ\200\231t give much thought to is I must say, it imperative to regulate the future of the legal profession in this constitution. Now I've forgotten the third question.

The outstanding matters.

That would also, to my mind, be a subject of a transitional provision which will probably be dealt with in the last chapter of the constitution as it is usually done.

Right. Mrs Giba.

Thank you, Chairperson. May I know from the Technical Committee how this Magisterial Service Commission is going to be composed? That is on Section 98.

Magisterial Services Commission, is that what the question is relating to? â\200\230

Yes. The question is legitimate. =˜ We havenâ\200\231t set out specifically, but we say it will be composed as prescribed by law. So clearly you will have to have a legislation that will deal with that. Let me just point out one thing that would perhaps clarify part of our approach. Matters which would call for greater investigation, and that would possibly be likely to change we have tended to have them regulated by Act of Parliament. Now think of, for instance, the profession - the legal profession - to reorganise the whole profession now has a whole implication anything from qualifications, which are regulated by statute, right across to admission requirements, and its a massive area of legislation which you cannot, and you rather not deal with in a constitution. So its best left to legislation and all we are doing is to keep most of those in place - this is transitional provision - bearing in mind that this is a transitional constitution. And as soon as there has been

Chairperson:

Dr Rajah:

Chairperson:

Mr Moseneke:

proper consultation investigation with all stakeholders in the particular area, e.g. the professions, then you would introduce appropriate legislation after appropriate consultation. And therefore perhaps in regard to the magistracy there will have to be much more consultation around how do you constitute the commission and in that way try and build it into the even the development that has recently started, around building in greater independence in respect of the magistracy. ’

Right. I donâ\200\231t have any more speakers. There have been a few queries, so ... Dr Rajah. ’

Madam Chair, the question .. what .. the existing court structure. Presume they talk about a court system they continue .. reorganise. He mentioned something about the admission requirements for prosecutors and magistrates. Exactly what did they have in mind when we talk about the restructuring of a court? Because I donâ\200\231t presume that it denies the right to appoint further magistrates or prosecutors etc. Secondly, 6.2 says that we think it would be undesirable in a constitution for the transitional period, to make more changes in the organisation and functioning of the court than are absolutely necessary. On the one hand we hear that we should not make too many change in the interim period because we are in the transitional phase which would imply then that some of the inadequacies that we have in the system then must be maintained for five years which then can be unacceptable because I think the transition period also offers an opportunity in a phased manner to bring about the necessary changes in order to make the courts more representative or to restructure the courts. So there should be provisions also in the interim phase for some possibility of restructuring and reorganisation and I donâ\200\231t envisage that there is going to be a massive change and reorganisation of the structures of the court. So if I can get some clarity on what aspects are they talking about when they talk about a court system and a court structure.

Technical Committee? Mr Moseneke.

Yes, we have asked in our Report that there should be no wholesale or massive restructuring precisely because we are going through a period of transition, but on the other hand that doesnâ\200\231t preclude this Council from looking at the desirability of restructuring if they would so wish. So the point is on the Agenda and you may very well go along with our proposal, but one should, of course, draw a line between restructuring the court system and the personnel and ensuring that the courts as

Chairperson:

Mr Moete:

Chairperson:

Dr Venter:

Chairperson:

they are are representative both at whatever: gender and/or race and other levels. So one must draw that distinction. You may very well not restructure your courts, but ensure that there is sufficient flow of persons in various positions to render it representative. Or Council may go for an open-ended restructuring in which event you would want something not less than, for instance, at least two or three commissions weâ\200\231ve had which should actually investigate the courts, how they function and then propose restructuring, because quite often as you restructure courts they tend to reverberate right across. You have go to fine-tune their respective jurisdictions. You have got to fine-tune their whole functioning and it is something that you cannot readily do in all its full glory and detail in a constitution, and that is why we opted for the approach which I have already explained earlier, that these change should be done by legislation. So nothing stands in the way of the new Legislature to investigate fully and consult with all stakeholders and restructure the courts if they so will. But our proposal was that that should not necessarily be done through the constitution. The final decision rests with this Council.

Right. Mr Moete is now speaker on this issue.

Chairperson, there is a provision for the appointment of judges and other courts, but I see in Page 10 in the appointment of the Attorney General there is no provision who appoints the Attorney Generals.

Technical Committee, would you like to respond?

Madam Chair, we didnâ\200\231t intend to affect the present position regarding the appointment of Attorneys General at all. It is well regulated at this stage, but itâ\200\231s also subject possibly to change by means of legislation eventually.

I think if we look at G; I think there have been more queries that have been asked about whatâ\200\231s been put before us. We havenâ\200\231t been through clause by clause of Paragraph Section 90 and 91 and 96, so I think there probably are still going to be some more questions as people come to grips with some of those, but in general I donâ\200\231t see that anybody â\200\231s adverse to how the proposals are getting put forward here . Just some small details which you have heard some inputs on. So can we accept that the Technical Committee, the direction in which they have pointed us with the ordinary courts, the Supreme Court and the other courts, that we accept that direction. If anybody wants to make any inputs seriously for alterations, if

Dr Venter:

Chairperson:

Speaker:

Chairperson:

Mr Desai:

Chairperson:

Mr Rajbansi:

Chairperson:

Mr Moosa:

they can put that in submissions to the Technical Committee, but otherwise do we take it accepted that this is the direction that we want to be going in? Are you agreed? Right, and then can we come to Paragraph H: How should the judges of the Supreme Court be appointed and removed from Office. Itâ\200\231s Page 15 in the Twelfth Report, and sections 92 and 93 of the addendum.

Madam Chair, may I just point out this has actuallyâ\200\230 been discussed already in the course of discussion of the question G.

Is everybody happy that we have actually
No, not really.

No. Sorry we have some people who feel they would like to make a further input. Right Mr Desai, followed by Mr Rajbansi.

I just want to enquire as a matter of order, whether we still have a quorum? I see a lot of empty seats around.

Right. Weâ\200\231re just checking, thank you. Yes we still have a quorum, so can we continue and please let nobody leave so we can get through and meet our objectives today. Right. Mr Rajbansi followed by Mr Moosa.

Madam Chair, Judicial Service Commission. I just want to suggest to the Technical Committee to consider the following in addition to what is contained here. One Judge President designated by a committee of the Judge Presidents of South Africa. G to be altered, 4 members of parliament, and to add I, one magistrate designated from the new magistrates body that has been established. Three proposals - Iâ\200\231ll put that in writing to the Technical Committee for consideration.

Thank you. Mr Moosa.

Chairperson, the first point I would like to make concerns 92.1 in which we would suggest that the Chief Justice should be appointed by the President after consulting with the Judicial Service Commission. The second point is on the composition of the Judicial Service Commission itself, that if one looks at the suggested composition there, I think that one of the first problems that we are likely to run into is the gender question once again. Itâ\200\231s likely to be, with this kind of formula, it is likely to be for a very long time dominated by men and that

Chairperson:

Mr Titus:

perhaps we should have some special provision. A suggestion

that we could make is that in addition to the people you have there, it should also consist of one person who has specific qualifications and specialised knowledge of gender issues, or

something of that sort in order to ensure that the gender

question is taken into account by the Judicial Service

Commission at all times. It will be particularly important in the work of the Judicial Service Commission that it is gender sensitive. I donâ\200\231t need to elaborate on that. We would also

like to suggest that in addition to five senators serving on the

Judicial Service Commission, there should also be a number of people that could be appointed in addition at the discretion of the President, not necessarily members of the senate or the

national assembly, but the President could, for example, have

the power to appoint up to four members of the legal

profession in order to ensure that the commission is balanced in terms of both race and gender. And those are both factors

which should be taken into account here. The Judicial Service

Commission is not a court, it is a Judicial Service Commission

and it would of course play a very big role in determining what our courts are going to look like. The additional, the

appointments which the President can make, we are not suggesting that the President should be obliged to make them,

but looking at the composition of the Judicial Service

Commission, how it comes out, the President should have the

power to say perhaps if we add two more people here of this

race or that sex we could balance it out a bit more.

Thank you for that input. I think the Technical Committee has heard that input, and is it possible to accommodate Mr Moosaâ\200\231s concerns? Mr Titus.

I hope I am the last speaker on this particular subject, this particular clause. Having said that, with regard to 92.1: I just want to get some assistance from the Technical Committee for purposes of further consideration of this particular clause. What I want to establish from them is, with regard to qualifications they have merely stated fit and proper persons. Thatâ\200\231s in accordance with the present statutory position, that is the state of play as at present. But if you look at Clause 88.2 with regard to the Constitutional Court, they have attempted to set out qualifications. Now I just wanted to find out whether with regard to judges and the ... whether the failure by the Technical Committee to set out the qualifications was deliberate, or whatever. It is not in a spirit of criticism, I just want to know whether this was deliberate.

27 September 1993

Chairperson:

Dr Venter:

Speaker:

Chairperson:

Mr Chaskelson:

Right. Dr Venter.

Madam Chair, I think one can expect that the momentum regarding the appointment of judges as has been done for more than a century in this country, would probably be continued but the Constitutional Court is a new institution with a different, as we put it in our report, with a different emphasis on its task and thatâ\200\231s why we dealt more extensively and completely with the qualifications for that court which will also probably be different, because itâ\200\231s a different kind of a court, with a different kind of a jurisdiction than the ordinary courts. That would be the reason.

Chairperson, in all fairness to Mr Titus, I must also add that behind that provision which of course with the present statutory provision on appointment of judges, there is a standing convention that we refer to in our reports. In other words whatever momentum our colleague is talking about, built in it was a particular method which was a selection from the ranks of senior counsel which has an inherent limiting feature, so it is a matter that perhaps may be worthy of a relook because in the one the approach is quite clear. In the other, that statutory formulation implies that you would retain the convention that goes together with the way that section was interpreted over the years.

Right. Mr Chaskelson.

Yes, I think that there a number of factors. It was actually a deliberate decision simply to leave it as a fit and proper person precisely because the qualifications really donâ\200\231t tell you very much. You set out a series of qualifications and they were there for a constitutional court to show that this new court should really call for a certain expertise in law. That it wasnâ\200\231t a court to which should be appointed people who didnâ\200\231t have that expertise. It wasnâ\200\231t a court which we contemplated would be .. to which politicians would be appointed, or sociologists would be appointed, it would need that expertise in law and constitutional law and went in for that reason. But you could really in the last resort depends upon the person. There are some people with five or ten years of fifteen years experience who wouldnâ\200\231t be acceptable candidates, they might meet ..

obvious suitable candidate. Others will be suitable because of the persons who they are, and I think as far as judges were concerned, we felt we would just leave it to the Judicial Service Commission to decide upon their own criteria for the appointment of judges and not to suggest anything at all.

Chairperson:

Dr Venter:

Certainly I donâ\200\231t think amongst ourselves there was ever any intention to perpetuate the existing state of affairs in which as a matter of practice senior counsel from the Bar are invariably appointed. We certainly donâ\200\231t say so, and I wouldnâ\200\231t have thought that any of us had that intention, though as Mr Moseneke says, it may be inferred or some people may infer that that was the intention. If they do I think it would be a wrong inference. It would be up to the Judicial Service Commission to establish its own criteria.

Right. Thank you. Mr Titus are you satisfied. Right, I think then that brings us to the end of the discussion on H. I think there have been some queries raised. I think Mr Rajbansi said he would put in some submissions. Mr Moosaâ\200\231s asked for opportunity for balance, and I think youâ\200\231ve heard what Mr Titus had to say about the qualifications but I think he seems satisfied with your response. So in general those clauses with those few inputs seem to be acceptable. Am I correct? Does the Council accept that in general those are fine - need to be honed up with a few alterations maybe. I have now left on the Agenda this Paragraph I. I wonder if the Technical Committee can help me here. Iâ\200\231m sure some of these things we have actually addressed in the wide ranging discussions. Is there anything that we particularly want to look at here? Must we look at them all? Can I be guided by you, but giving the fact that we do have some time constraints?

-˜ Madam Chair, those sections were listed because they Ã©ver'enâ\200\231tr, _mentioned in-the previous parts of the Agenda. If one quickly

goes through them, 86 is a formal kind of provision. 87.3 is- also of a general nature - shall bind all persons and all organs of state. 87.6 very technical, but thatâ\200\231s the kind of provision that we-said earlier we may want to consider to include also in the parts dealing with the Supreme Court, and 87.7 as well, we have dealt with. Section 89 is also a formal provision; what happens there is that the way in which .. come before the Constitutional Court is actually dealt with in 90, but the

" foundation is laid for that in 89. Section 90, subsections 8 - 12

also deals with the manner in which appeals go to the Appellate Division on constitutional matters from the Supreme Court, formal matters in other words. 94 is also probably not very controversial, but it is contemplated there that there could be two different seats for the Constitutional Court and for the Appellate Division where the status quo is suggested to be

Chairperson:

Speaker:

Dr Venter:

Chairperson:

Dr Venter:

Speaker:
Chairperson:
Speaker:
Chairperson:

Dr Venter:

Chairperson:

Mr Rajbansi:

retained.

I think wÃ© have a point of order?

Just a question of clarity on 94. What is the view of the

Technical Committee that the seat of the Constitutional Court

shall be where the Legislature .. the seat of the Legislature.

Do they have any view on that because I want to make a
proposal?

Madam Chair, ... political question where the seat of the
Constitutional Court should be if not in Bloemfontein.

Sorry Mr Rajbansi, before we get onto that can just go through
- I just want to identify are there - which of these items must
we address now? Have we got the time to address now,
because we are going to be closing at seven oâ\200\231clock and I
would like to get some guideline from the Technical Committee
which of these things we could address quickly now, if there
are other important things weâ\200\231ll have to leave them over. So
I am in your hands, Dr Venter.

Madam Chair, if I can take you through the rest. 95 is a
formulation basically of the status quo regarding the use of
languages in the courts. 97 and 98 really have been dealt with

Madam Chair, on 95 will we revisit?
Right, 95

Will we revisit that issue?
Right. Weâ\200\231ll go back to 95.

97, 98 really have been dealt with and the Oath of Office is
well, the ordinary kind of thing.

Right. Can I just ask the Council, I know Mr
Rajbansi wants to revisit 94, Dr Rajah 95. Are there
any other clauses here that people would like to
return to. Right, would you like to visit 94 and 95
this evening. Sorry who is calling me? Ok, Mr
Rajbansi. :

Arising -out of the comments made by the Technical

Committee, I just want to give notice that I am going to, 90 for

Chairperson:

Dr Rajah:

Chairperson:

Mrs Masehela:

Chairperson:

Mr Moosa:

Chairperson:

Mrs Jajula:

Chairperson:

Mr Desai:

one, lay a very strong claim for Pietermaritzburg.
Right. Dr Rajah.

Madam Chair, I think this is an issue that we have got to revisit once we sort out the issue of the language etc. 95 subsection 2. :

Mrs Masehela.

95.1 â\200\231an accused person and a witness may during the proceedings of court use a South African languageâ\200\231 - what about if we just say â\200\231use the language of his or her choiceâ\200\231 because you might find that the accused is an immigrant from Australia ..

Thank you. Mr Moosa.

Chairperson, sorry on 94.1, we are in agreement that the seat of the Constitutional Court should not be the same as the seat of the Appellate Division and the Appellate Division should remain where it is, that is in Bloemfontein. As far as the Constitutional Court is concerned, and because we are building a completely new order, we are proposing as the ANC that the Constitutional Court should actually have its seat in Soweto, and we would be making a .. itâ\200\231s not made in jest Comrade Chair, I mean Chairperson. We donâ\200\231t see why Constitutional Court should be in white cities as such. There is absolutely no reason why it cannot be in a place like Soweto. We would be submitting a proposal on that one.

Right. Thank you. I have Mrs Jajula who would like to come in.

Chairperson, I unfortunately I disagree with Mr Moosa that we have a Constitutional Court in Soweto. We need to have it in a more neutral venue which is accessible to other people as well. Thank you.

Mr Desai.

I must disagree very strongly with Mr Moosa. Cape Town is the place where this court must be.

Chairperson:

Mr Titus:

Chairperson:

Mr Titus:

Chairperson:
Mr Titus:
Chairperson:
Mr Titus:

Chairperson:

I think we could go round the whole room and everybody would we would probably end up in Pofadder eventually. Right I think if .. there are obviously one or two clauses there that are still outstanding and weâ\200\231ll come back to visit some of them. If we can just sum up. Weâ\200\231ve had a very wide ranging discussion on these inputs that the Technical Committeeâ\200\231s prepared for us. Various parties have said they would submit submissions. We also took cognisance of the fact that there are outsiders that would also be putting forward submissions that have already been received by the Technical Committee. But there seems to be general agreement that whatâ\200\231s ben put in front of us today, that there is general agreement from the Council that the Technical Committee is pointing us in the right direction and weâ\200\231ll come back to revisit most of these clauses again. Thank you very much to the Technical Committee for their input. Mr Titus?

The Technical Committee can be released, but we are in the habit immediately the Technical Committee is released of just getting up as well. I am just going to address something different. Very important if you can be patient with me. Itâ\200\231s got nothing to do with the Technical Committee. You will recall, Mr Gordhan, when he gave his address, report from the Planning Committee he dealt with the procedure to be followed with regard to the processing of the bills in Parliament.

Sorry Mr Titus, are you being disturbed by the goings on in the ..

Yes, I am being disturbed by the Labour Party. But I just want to address that, Madam Chair, because time is of the essence. A lot will happen from now up until Thursday when we next meet, and I would like to table this document formally. You must know that this is the procedure that we will be following. Right. So you are just tabling the document?

For the record.

For the record.

To be part of the Minutes.

TECCOMM/DOCUMENTS/TRNS.KIM
27 September 1993