

CONSTITUENT ASSEMBLY

ASSEMBLY CHAMBER
WINDHOEK
25 JANUARY 1990
14h15

The Assembly met pursuant to adjournment.

THE CHAIRMAN took the Chair and read Prayers.

LETTERS RECEIVED FROM AKSIE CHRISTELIK NASIONAAL

CHAIRMAN: Honourable members, I received a letter from Mr J W F Pretorius, a member representing Aksie Christelike Nasionaal in the Constituent Assembly and signed by him in the capacity of the chairman of the said party, to inform me that the nomination of Mr J M de Wet as member of the Assembly had been withdrawn.

I also received a letter from Mr de Wet, a member representing the same party in the Assembly, informing me that he still represents ACN in the Assembly and that he has no intention of vacating his seat.

Having obtained legal advice, I am satisfied that it is not my duty and neither do I have the power to intervene in the internal affairs of registered parties. Consequently I earnestly appeal to my honourable brothers, brother Pretorius and brother de Wet, to resolve their difference in the typical fashion that has now become a Namibian kind of second national anthem, that of the spirit of reconciliation and then to inform me of the outcome. In the meantime, since we are nearing independence I hope that while they are going to resolve this question outside the Assembly, that we will continue to achieve independence for this country. But I appeal to them to resolve this problem peacefully through the spirit of reconciliation and then to come back to us.

TABLING: DRAFT CONSTITUTION OF THE
REPUBLIC OF NAMIBIA

CHAIRMAN: Honourable members, today's meeting is really

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for your committee of 21 hardworking Namibian patriots to table the draft that they have been working on for so many minutes, hours, days and weeks. We worked long hours. If I can give the example of today's meeting, that we have been locked up there by honourable Mr Dirk Mudge until very, very late, or the early hours and we adjourned this morning about 2.30. I would like to take this opportunity as Chairman to thank all those great people, one lady and men, that have been sitting all these long hours to shape the future of this country. We are indeed proud to meet so that we can table what I consider as one of the best constitutions in the world, that the Namibian people themselves - maybe only after the Americans, had that chance to do - have been sitting to hammer out.

Indeed, if we were not inspired by a spirit of reconciliation, brotherhood and sisterhood, and above all, a spirit of commitment to this country's future, we wouldn't have come out with a document like this. But since the committee was only your committee, appointed by you to draft this constitution and then to come and submit it to you as the final arbiters, we are of course doing that, not limiting you from making comments, from altering it as you want, debating it and then eventually to adopt it by a two-thirds majority.

I must also take this chance to apologise to honourable members for the leakages made some time ago, that the press got the document, printed it and the public was debating non-issues that were not contained in this document. We regret that leakage, it didn't come from the secretariat, it came from one of the honourable members whose name I will withhold for the time-being. So, I apologise that the members had to read about their own document in the press first.

I will also appeal to the press that we are entering a very serious stage in our struggle for liberation, that the leadership must show responsibility and that also applies to the leaders of the press. It is good to publish anything, that is what we are guaranteeing you in this paper, but certain things are delicate and if improperly disclosed it only causes confusion. But that doesn't in any way mean that we didn't want the press to know what we are doing, and through the press the public, but as you will recall, we had an election to elect the Constituent Assembly, so people were delegating delegates to go and draft the constitution on their behalf. This Constituent Assembly couldn't sit here and draft a constitution, so therefore they appointed a smaller drafting committee. I can give the African example: If I send

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you somewhere to my village to go and pick up something and bring it to me, you cannot stop halfway and start dishing it out to others. You must first come to me and give it to me and then I can reveal the contents.

Similarly we couldn't have revealed any contents or allow the press to know parts of the constitution until we have discussed it and, as I am doing today, tabled it in this honourable House. Thereafter the press can pick it up, you can write. I think you must get ready your pens and papers from tonight on so that you can write and write and write and we shall read and read and read and then we may add some of the things in the constitution as it is going to be adopted finally.

Honourable members, it is now my privilege and honour, a great honour indeed, to in a historic way table this draft constitution, the draft constitution containing 132 articles, the result of very, very hard work of your sons and daughters. It is now in your hands, honourable members, to discuss it and to adopt it.

I therefore, lay upon the Table:

The Draft Constitution of the Republic of Namibia.

ADJOURNMENT OF ASSEMBLY

The Chairman adjourned the Assembly at 14h35 until Monday, 29 January 1990 at 14h15.

CONSTITUENT ASSEMBLY

ASSEMBLY CHAMBER
WINDHOEK
29 JANUARY 1990
14h15

The Assembly met pursuant to adjournment

THE CHAIRMAN took the Chair and read Prayers.

NOTICE OF MOTION

MR GURIRAB: Mr Chairman, I give notice that tomorrow I shall move -

That this Assembly -

desirous of becoming a sovereign, secular, democratic and unitary State at the earliest possible moment;

believing that the Draft Constitution now before the Assembly will be adopted within the next few days;

having sought the views of the Administrator General in terms of Section 2(2) of the Proclamation;

Now therefore resolves -

to determine, in terms of Section 2(1)(c) of the Constituent Assembly Proclamation 1989, (Proclamation AG 62 of 1989), 21 March 1990 as the date on which Namibia shall be declared an independent state.

DEBATE ON DRAFT CONSTITUTION OF THE
REPUBLIC OF NAMIBIA

DR TJIRIANGE: Thank you, honourable Comrade Chairman, honourable members of the Assembly, allow me on behalf of Swapo to make some observations on the Draft Constitution for an Independent Namibia tabled by the Standing Committee in this honourable Assembly on the 25th January 1990.

It will be recalled that when I introduced a synopsis of

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Swapo's draft constitution on the 4th December last year, I repeated the appeal made previously by the leader of our party and honourable member of this Assembly, Comrade Sam Nujoma. In his appeal on the 21st November last year he said that it was incumbent upon every honourable member of this Assembly to hasten the day of independence by constructively contributing towards the drafting and adoption of the Constitution for the Republic of Namibia. It was in this spirit that the Constituent Assembly appointed a standing committee to negotiate on a joint draft of our constitution. This unity and purpose and spirit of understanding was demonstrated throughout the entire process of the subsequent discussions. The result has been a very important achievement of which we can all justifiably be proud.

In Swapo's judgment the draft is the product of a job well-done. The final draft now before you reflects the agreements on all principle issues correctly. The formal shortcomings, such as incorrect internal references, spelling errors and omissions, for example in regard to the transitional arrangements and the National Planning Commission, were inevitable in the light of the fact that the Standing Committee concluded its deliberations only during the early morning hours of the 25th January, leaving the drafters with very little time to provide us with a document for tabling in this honourable House.

I would like to take this opportunity to thank most sincerely all the members of the Standing Committee for their commitment to negotiate in a spirit of reconciliation, in a spirit of give and take. It was this commitment which enabled the members of the Standing Committee to overcome even the most serious differences and difficulties encountered during the lengthy negotiations.

Allow me, honourable Comrade Chairman and honourable members, to state clearly that on our part we are ready to live with the Draft Constitution, once adopted. The Draft Constitution is the document which can rightfully claim to originate from the Namibian people, a compromise reflecting the aspirations of all sections of our society. Given its local roots, I have no doubt that, once adopted, the Namibian people will regard the Namibian constitution as a durable document which deserves to be upheld and steadfastly guarded as the fundamental law of a free Namibia.

Let me briefly say something about the cardinal principles of the Constitution.

Swapo of Namibia holds the view that a government should

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be a creation of a constitution and subject to it. It is the constitution that creates the organs of the government and vests in them the powers necessary to govern without impeaching on the basic rights of our people. We regard the protection of this fundamental right, of which our people have been deprived for so many decades, as absolutely essential. We believe that the Draft Constitution tabled before this Assembly meets this requirement adequately and in a practical way.

Having said this, and without intending in any way detracting from our commitment to the compromises contained in the draft before you, I would like to state the following about some of the items which we have wanted to be included in our future constitution, but in respect of which in the national interest and for the sake of unity of the broadest possible basis we were prepared to make further concessions.

1. Single member constituencies:

Swapo, in its initial proposal, argued in favour of a single member constituency system as the basis for the election of members to the legislature. This we did in the belief that the representatives elected in their own right by the electorate in each constituency would ensure a closer affinity between the elected representatives and the electorate. The principle of democratic accountability would, in our view, have been served better in that way.

Furthermore, the system provides a better mechanism for participating in the democracy in that the people can air their grievances by means of petitions channelled through their elected representatives in their respective constituencies.

2. Single chamber legislature.

Our draft constitution proposed a unicameral legislative body composed mainly of members elected directly by popular vote. The basis of our proposal was that a unicameral body promotes unity and efficiency. A single member chamber legislature enables legislative power to be vested in a single institution. It also facilitates the administration to pass through parliament without undue delay. Indeed, we rejected bicameralism primarily on the ground that it might entrench bantustanisation and that it bears in it the seeds for potential conflict.

However, in view of the nature of the compromise reached,

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we believed that we can live with the idea of a second house, in spite of its obvious shortcomings, including the substantial additional cost the creation of such a house will mean to our scarce resources.

3. Anti-apartheid provisions.

For a very long time the people of this country have suffered under the oppressive regime of apartheid, a system which has denied our people the most basics of human rights. In our view it was a system which constituted an outrageous offence against the people of this country and against which future generations of this country should be protected in this constitution. It is for this reason that our Draft Constitution was forthright on the issue of apartheid. Regrettably, we feel that this has been watered down in the Draft Constitution tabled before this Assembly.

4. The President.

In our original proposal we provided for a strong executive president with a popular mandate to effectively implement the laws and ideals of our nation. It is Swapo's considered opinion that there are strong arguments for an executive president capable of taking expeditious and decisive action when the need arises. Although the principle of an executive president has been maintained in the present draft, his functions and powers have been severely limited in order to provide an elaborate system of institutionalised checks and balances. This was considered by us in order to meet the concerns raised by some of our colleagues representing other parties in this honourable House about the potential of an undemocratic president developing. We do not agree with the fears, but once again, we were prepared to compromise our own position for the sake of reaching consensus on this important issue.

Notwithstanding our observations, however, I would like to take this opportunity to reassure this Assembly once again that our party is fully committed to, and support the Draft Constitution tabled before the Assembly. We entered the negotiations mindful of our president's appeal to negotiate in good faith and with the interest of the Namibian people at heart. The result of our ensuing discussions and endeavours is now before you. We, on our side, would regard its adoption substantially in its present form as a victory for all the people of Namibia.

In conclusion, Swapo has no hesitation in commending the Draft Constitution for adoption as the governing consti-

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tution of our emerging state. The unanimous adoption of this Draft Constitution is a shared goal of the Namibian people. If it receives support from all the parties represented in this Assembly, I have no doubt that the Namibian people will regard it as a shrine for their hard-earned freedom.

In the final analysis, therefore, Swapo wishes it to be known that, taking everything into account, we are prepared and ready to live by the constitution as it stands. It is only in this spirit that the constitution will assume a durable character and thus withstand any cunning manipulations from anybody. Thank you.

MR MUYONGO: Mr Chairman, honourable members of the House, allow me to highlight a few things in the Draft Constitution.

Mr Chairman, Namibia is on the verge of independence, the process is almost complete that this House can eventually adopt a constitution for the work of its own. Mr Chairman, I will fail in my duty if I don't thank you personally. I was told - and please don't ask me by whom - that you played a very good role in trying to narrow the gap and the difficulties that you had behind closed doors. I will also fail if I don't thank the members of the Standing Committee as a whole for the job that they have done, and again I must single out - I hope you will bear with me if I say to my four colleagues from the DTA for the contribution that they were able to make in that committee.

The Constitution as it stands now is a good document and if looked at again, if people are not going to say it can't go back to the drawing board for a minor additions - my emphasis is on "minor" - I think we will be able to produce a good document that the people of this country can live with.

It is very important that the people of this country, having suffered at the hands of apartheid and discrimination for such a long time, must have a document that they can believe comes from the minds and hearts. Having said that, I believe the document is almost there, except for a few things that in the course of the debate some of my members will make reference to.

The people of Namibia, irrespective of their party affiliations, have shown to the world that they are able to

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work together in a spirit of give and take, and that they are able to produce a document that the world will be able to say, "this is a good document." But again, let me appeal to you, let us not say it is a closed house, it cannot be opened. We just want it to be opened a little bit so that certain things, that we believe, maybe because of hard work, maybe because of long hours of work, you might have lost sight of that we think should be included.

Mr Chairman; allow me to look at the following in the document: It really appears to be a very good document which has taken into consideration, I think, a lot of the major aspects that concern a constitution of a country. I was even going to say that our Standing Committee which worked so hard, maybe if they don't mind - I am not saying that they are a commodity that can be exploited - we could really say to the new democracies that are emerging from Eastern Europe, having spent forty years in unknown things, that maybe our committee can go and help them.

This document is really exceptional given the fact that Namibia is a Third World country, and given the fact that we are Africans and we were able to produce a document of our own that a few people, or even experts, can say there is a lot of political content in it.

For example, if you take the Bill of Fundamental Rights it deals with the questions of detention without trial, martial law, emergency law. Really, I think if there is anything the people of country want it is peace, if there is anything they want it is democracy, and they really want to exercise that in their individual rights. So, let's not point a sword at this Bill of Fundamental Rights, because then it might lose its meaning.

Another thing that I want to make reference to is the fact that very important things - to me at least - were left out and that is the issue of communal land. In this constitution there is no reference to it, except customary and common law which, to my mind, don't tie in with the very important issue of communal land. We have our people living in these areas, the land belongs to them, but our Constitution has not made reference to it. So, Mr Chairman, I wish to ask that a few of these issues be tackled again by our very able committee under your very able chairmanship, so that we can allay the fears of our people wherever they may be, that nothing that belongs to them is forgotten, that nothing that belongs to them in terms of land is going to be snatched away in a dubious manner.

The other thing I want to mention here is that this House

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is going to debate the Draft Constitution. I want to believe that as we get rid of colonialism, as we get rid of apartheid we should not give any leeway whatsoever to bring it back in a different manner or what one can refer to as maybe using some constitutional tricks. I want to say here that we have seen what Africa has gone through. Some of our African brothers on this continent have tried a number of things in terms of constitutional arrangements, but all ended up in disasters. We have had one-party states, we have had socialist states. I hope they are not going to travel the long way. By the way, I was told communism is the long way to democracy. First you start off with communism and you end up with democracy. So, I hope our brothers too are not travelling the same long way, that will take them maybe 70 years or 40 years before they reach their goal to attain democracy.

The draft addresses itself to the question of citizenship. I think this is very important and as we deal with it we should not leave any loophole, because it is very dear to the people of this country to be a citizen. It is very dear. So we hope the small problem that we have on that - it could be a clarification - will be able to be given some proper legal clarification so that we will be able to understand. There is one paragraph which, to my limited knowledge, I tried to read maybe ten times and I couldn't understand. It was dealing with citizenship. So, I hope I will be able to be helped by the committee or by this House to get proper clarification on citizenship.

As I have said, we have dealt with the fundamental human rights. We have asked a number of people with the know-how, with the understanding of the Bill of Fundamental Rights in order to make really sure that what we are going to have in our draft is something that people can live with, something that is not going to bring back discrimination in a different manner.

So, Mr Chairman, having said that, allow me to conclude, that the DTA on its part is prepared to discuss and finally adopt this Constitution as prepared to discuss. As we discuss we believe the people of this country must get to know the work that we have done for so many months behind closed doors, so that they come along with us when we finally adopt this document. I thank you, Mr Chairman, it is their right, they must be given the chance to know what is happening, but I can assure you, as far as the DTA is concerned, we are not standing in the way of this great work done. As I have said, the members who participated produced a document, not only reflecting the wishes of one given political party, but the wishes of all the people

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who were there, the Namibians who were seated behind closed doors to try and hammer out a compromise document.

Having said that, I hope you agree with me that we give a chance to people who want to say something about this document, so that at the end of the day we will be able to adopt a document that all of us are sure of. We shouldn't go back and say "I made a mistake", or we go back regretting that we have adopted it because we still have this difficulty. I think we should give the people a chance to try to air their views so that we eventually get our very good document in the shape that it can be accepted by the people of Namibia. I thank you.

MR J GAROEB: Mr Chairman, honourable members of the House, allow me on behalf of the United Democratic Front of Namibia to make a few remarks on the Draft Constitution which was tabled in this honourable House.

Mr Chairman, it is with great delight and appreciation that I am in full concurrence with those who view the near completion of this Constitution for the Independent Republic of Namibia as a memorable achievement. A whole number of material differences were identified right at the beginning. Notwithstanding this, the startling reality of today is that without a single exception all were bridged and today we have a document before us which we can be proud of as a joint product that was born out of sessions characterised by heated debates, disagreements, quarrels and, of course, mutual suspicion at the back of our minds. I have reason to be confident that the constitution drafting process has reached a point where we can declare to Namibia and the whole world at large: "We have crossed the Rubicon."

Furthermore, Mr Chairman, there can be no doubt that the spirit of co-operation, progress, compromise and reconciliation has stood its first and biggest test. Would it be premature to conclude that the historical Namibian Constituent Assembly can measure up to whichever challenge the future might hold in store for this nation?

However, honourable Chairman, we should not lose sight of the fact that this painful process of nation-birth, of which we are so honoured to be midwives, involves innumerable complications and challenges which we must face if we are to lead this process to a successful conclusion. Today we have a Draft Constitution laid before us to add a

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few touches where the committee has failed to do so. Of course not in totality, but this document may just as well be regarded as an agreed compromise package embodying aspects of various constitutional proposals presented and concerns expressed during the negotiating process. Our participation in this constitutional process stems from our belief in a limited government, through separation of powers and inclusion of a wide range of devices in the constitution defined to prevent serious abuses of power by the legislature and the executive. It is evident that this object is shared by many who are party to this process. The degree of display of political will leaves little doubt that there is general consensus among political parties, that Namibia needs a democratic government, responsive not only to parliamentary opinion, but to the opinion of the public as well.

Mr Chairman, this document before us is our product of which we are very proud and which we would untiringly defend against undue attacks. However, we shall be very frank about the fact that we have our position reserved on some few aspects. By reserving our position we want to signal to our colleagues on the other side of the table that we are not happy about these items. It is not our view that they constitute material differences, not at all. All we want is for us to look at them again in the spirit of give and take and in constructive maturity consult once more and settle these issues in a manner placing all sides at ease.

Firstly, Mr Chairman, article 11, page 11 - arrest and detention. Any arrest or detention is a derogation from, or infringement of the right to liberty. Consequently we believe that any extension of preventative detention, as contemplated in Article 11(5), should only be permitted in instances where such detention was in the first instance authorised as a result of an act or omission alleged to have been committed, and should not extend to those cases where it is merely apprehended as constituting a danger to the state. We suggest therefore that article 11(5) be amended by insertion of the words, "threatened action or the continued use of threat of violence, insurrection and the like," after the words "protection against".

Secondly, Mr Chairman, appointment of Chief of Defence Force, article 32(3)(1)(cc). Notwithstanding the fact the President is in any event the commander-in-chief of the Defence Force, we believe that the appointment of such an important functionary as the Chief of the Defence Force, as contemplated by 32(3)(1)(cc), should only be done with the approval, or in consultation with Parlia-

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ment.

Thirdly, appointment of Inspector General of Police, article 32 (3)(1)(dd). The same remarks apply to the appointment of the Inspector General of the Police.

Fourthly, President, Chapter 5, page 24. Whilst we have no objection in principle to the direct election of the President by virtue of direct universal and equal suffrage, as contemplated in article 28(2), we believe that this should not detract from, or at least be subjected to his accountability to Parliament; his powers being derived from and subject to the provisions of this Constitution, and thirdly, Parliament, having readily access to the President and the President addressing the Parliament and answering questions. If these checks and balances are introduced in the Constitution, our objections would fall away.

Fifthly, Attorney General, article 85, page 55. Considering the considerable powers and privileges attached to the office of the Attorney General, we believe that the neutrality of the person filling that office should be ensured by regulating properly his appointment. The reference in article 85 to article 32(4)(a) concerning the appointment of the Attorney General is incorrect. But if it is indeed the intention that he be appointed on the recommendation of the Judicial Service Commission, provided that provision for his removal is also made, which is presently not the case, and provided further that these requirements would also apply to the appointment of the first Attorney General upon independence, our objections would be met.

Sixthly, Judicial Service Commission. We must once again point out that since the Judicial Service Commission comprises, inter alia, the Chief Justice and since the Judicial Service Commission has certain vital functions to fulfil from day one, such a Commission would have to be properly constituted immediately after independence.

Seventhly, National Council. We believe that the implementation of the National Council should not be relegated to some undefined future date, but should be implemented at the earliest opportunity, but in any event not later than twelve months after independence, to ensure that the desired objective of establishing bicameral parliament is achieved soon. In this regard we also point out that the reference in article 102 concerning the boundaries of the Regional Councils, which have a direct influence on the composition of the National Council, article 99(2) of the Constitution is incorrect. We make this observation

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directly as a result of the note accompanying the final draft, wherein it is stated that the internal references contained therein are not correct, in the hope that it may be of assistance.

We hope that our submissions would be met with the necessary understanding and consideration. I thank you.

MR PRETORIUS: Mr Chairman, during the discussions of the committee I reserved ACN's right to explain its point of view on certain principles, and I think it is now the appropriate stage to do it.

Someone once said that if one's point of departure is wrong, you can argue as you like, but you will remain wrong. Now, what is our point of departure in this particular case? I want to make use of my first English Bible presented to me as a member of this Assembly by the Gideons International and quote only two verses to you from Romans 13:

"Let every soul be subject to the governing authorities, for there is no authority except from God, and the authorities that exist are appointed by God. Therefore, whoever resists authority, resists the ordinance of God and those who resist, will bring judgment on themselves."

Mr Chairman, it does not necessarily imply that you must always agree with the government of the day, because Acts 5:29 puts it very clearly, "we ought to obey God rather than men."

To summarise our attitude, we are pragmatic as far as our policies, our methods are concerned. We are prepared to accept realities, but we prefer to stand firm on our principles. I myself am not afraid to admit that I am very idealistic as far as my principles are concerned, and it was against this background that I put ACN's viewpoint on the Draft Constitution during December 1989 in this Assembly when I, inter alia, said that "we cannot agree to the principles, but that we accept the challenge as far as the reality is concerned."

We believe that the function of an opposition party, especially a small opposition party, is primarily to convince, more than merely to oppose. Deviating from your principles just to try and be popular will hamper you very

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much in the fulfilment of your responsibilities and task. I learnt one thing of the honourable Mrs Ithana during our discussions in the committee, and that was the force of a minority which is convinced of its course. Numbers are not playing a big role in such cases. See for example the text on equality in the Bill of Rights. Where the convention is to talk about no discrimination on the grounds of race, colour, ethnic origin, etc., sex was placed first on her request. She fought for the rights of the women man alone.

Mr Chairman, in the Standing Committee we reserved ACN's point of view only on principle aspects. We co-operated and tried to contribute on the detail. I just want to mention a few examples without going into detail.

In the first place I find the approach from the Preamble onwards a bit negative and not appropriate in a constitution which is written for the future. I do not think it is necessary to mention the past in a constitution. Mr Chairman, you yourself once used the example of a glass filled half with water, a pessimist looking at it and saying it is half-empty, the optimist saying it is half-full. Let we all try hard to be optimistic and to fill the half-full glass rather than to emphasise the half-empty glass.

Secondly, the word "secular" in Article 1 has too many meanings and can be confusing. It is not so harmless as it may seem. It can just as well be deleted. ACN, in its first point of its election manifesto, put it very clearly: "ACN accepts the supremacy and guidance of God, also as the source of all authority in the destiny of peoples, nations and states." And interesting enough, in the "Namibian" of the 15th September 1989, there was a report under the heading, "Moenie die mens fragmenteer nie" - Do not fragment the human being, and quite an interesting photo of the honourable member Mr Sam Nujoma on top of this article, and then in Afrikaans - and I will translate it into English - it was said by a world-known minister of church from Zimbabwe, Mr Phineas Dube, while he visited Windhoek:

"Die Christelike geloof is nie net betrokke in die redding van siele nie, maar in die totale behoeftes van die mens."

The Christian's religion is not limited to the salvation of souls, but concerns the total need of the human being.

Another example, in the "Namibian" of January 8, 1990, under the heading, "Churchmen in the Constituent Assembly

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on their role in the constitutional process" four of the honourable members put their case. You can read it yourself. During our meetings we also accepted a circular from CCN, from Dr Abisay Shejavali: "A message to the leaders of Namibia gathered in the Constituent Assembly and to the incoming Government of Namibia."

Mr Chairman, one or other wise guy may in future, on the grounds of this word, "secular", ask the courts to rule that the churches and the church leaders keep their noses out of state policy. That is possible.

The "Namibian" of January 26, 1990, last Friday, with reference to the honourable member Mr Nahas Angula's policy document on education - very interesting, Mr Chairman:

"The inclusion of four periods a week of religious and moral education is in direct contradiction to the claim commonly made in the past that Swapo is a Marxist atheist organisation. This recommendation is sure to be welcomed by many, but it is also likely that there will be those who will remain sceptical about its inclusion in the syllabus. Some people will probably question whether religious education is not in conflict with the Preamble of the Constitution, which determines that Namibia will be a secular state."

So, my fears, Mr Chairman, are not so far-fetched. State and church are separate, but religion must always play a role. The word "secular" was not a provision or a condition in the 1982 Principles. In the spirit of give and take it can easily be left out. Why create confusion unnecessarily? To keep the word "secular", to my opinion, is to look for trouble. There is nothing wrong if the state, also in its policies, reflects the religious feeling of the majority, while respecting the freedom of religion of the minority.

In the third place, ACN accepts the diversion of peoples and/or population groups, their interdependence and the right to self-determination and co-participation. Here we have the irreconcilable streams of thought which are also reflected in the international constitutional world. Those who strictly believe in the self-determination of the individual, in opposition to those who rigidly stand by the concept of the self-determination of the group, ACN tried very hard - in the words which honourable Mr Angula uses so often - to strike the balance, but we could not succeed to convince the standing committee.

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As far as group or minority rights are concerned, there are usually four ways with varieties to achieve it in constitutional structures:

- (a) partition, perhaps the most ideal but not always the practical way;
- (b) a geographical or demographical federation;
- (c) group autonomy; and the weakest of the four,
- (d) majority government in a single state with a bill of rights stressing the rights of the individual, but not excluding his collective rights.

The committee preferred the last way while we believe that it does not go far enough. Being a minority we cannot but accept it and try to make the best of it. That, however, does not mean that we also agree to the principle that individual rights are absolute. We believe that there must be the necessary balance between individual and group rights.

The last example I want to mention in connection with my reservations in the committee is the fact that ACN, also according to its manifesto during the election campaign, pledges the necessary balance between rights and responsibilities of the individual as well as the group. We believe that every right supposes or assumes an identical responsibility, and if so, why not mention it in your fundamental rights? A bill of fundamental rights shall not only concentrate on juridical aspects, but also embrace the philosophical view of a specific community. Four of the seven parties originally had the word "responsibility" in their draft proposals, namely Swapo, DTA, NPF and ACN. In the process of give and take I do not think Swapo and the other parties should have given in to the DTA on this point.

To mention again a few examples, the Bible has no defined bill of human rights in it. On the other hand it has a bill of responsibilities. The Ten Commandments is in fact a bill of responsibilities. Swapo, in one of its draft constitutions, which I laid my hand on during June 1989, explicitly puts it in Article 11(1) under the heading, "Principles concerning Human Rights":

"The State shall ensure the exercise of human rights set forth in Part 2, and also the fulfilment of the duties that this Constitution and law imposes on persons."

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Mr Chairman, even the USSR and Cuba have responsibilities in their constitutions, not only responsibilities but also obligations, and they are not only mentioned, but it forms an integral part thereof.

In the Universal Declaration of Human Rights, Article 29(1): "Everyone has duties to the community in which alone the free and full development of his personality is possible," - also trying to have the balance between rights and responsibilities or duties and obligations.

The RES Reformed Ecumenic Synode (International), in its testimony on human rights in 1983, wrote:

"In the light of these Biblical perspectives as understood within the tradition of the reformed confessions, we affirm with heart and mouth the universal legitimacy of human rights as the God-given freedom and responsibility of all people, etc."

Here again we believe that there must be the necessary balance between rights and responsibilities. I do not want to teach my children that they only have rights, because I know in doing so I shall help to create an atmosphere of revolution in my own home. They will continuously demand their rights without accepting any obligations, because I have never educated them such. They will always remind me of their rights.

Recently the honourable member Mr Nahas Angula, in one of his requests, appealed to the teachers, parents and children, asking them to accept their responsibilities. I cannot do otherwise than to welcome it and to fully agree with him. It is small but important things like this which are giving me hope for the future.

Mr Chairman, if members of this Assembly feel that they are not capable of dealing with such a delicate and complicated matter, as for example the question of responsibilities itself, then please leave it to the honourable member Mr Angula and myself. LAUGHTER. But please, try and make it easy for us.

I do not want to go into detail about all my reservations. As you yourself ruled in the committee one day, I needed not to object each and every time, because you put it yourself that it was standard. What I have mentioned are from the most important, the rest is consequential.

To summarise, I am thankful to could have had the honour of representing ACN in the Standing Committee which was

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instructed to write a draft constitution. I liked the spirit in which the discussions took place. I liked the manner in which members in a peaceful way fought for their convictions. Even the DTA impressed me. I appreciate the way in which Swapo was prepared to compromise, as long as it was not me who made a proposal, but Mr Chairman, ACN and my integrity, reliability and trustworthiness are at stake. Nobody will believe us ever again if we in principle vote in favour of this constitution as a whole.

As I said during our last meeting on the 21st December 1989, we found ourselves in almost the same position as Beire, one of the Lander of West-Germany after the Second World War. Therefore we shall abstain from voting, because we cannot agree to the principles which form the basis of the Constitution. As democrats and as a minority we will however accept the challenge to help and make the best of this Constitution. While we reserve our point of view, we want to contribute in a positive way to make the Constitution work. We believe the glass is half-full and we want to help to fill it. That is on the condition, Mr Chairman, that if we cannot convince each other, let us try and accommodate each other in a responsible and civilised way. The result will then, inevitably, be national reconciliation. I thank you.

MR KATJIUONGUA: Mr Chairman, colleagues, fellow-Namibians, when we adjourned for Christmas and the New Year on December 20, 1989, I expressed the hope that all of us shall return in one piece to complete our historic task of writing a constitution for an independent Namibia. I am pleased today to have to place on record that since the Standing Committee commenced its work on January 8 this year, we have worked hard, at times long hours in the evenings, weekends and the early mornings. If there is anything which our tax-payers cannot reasonably complain about, it is the fact that we have tried our best to finish a job which, as far as I know, was never completed in such a short time in the modern political history of mankind. Through our patient, energetic and able Chairman, brother Hage Geingob, who could not be discouraged by anything for too long, the team is well-equipped, it is composed of bulldozers, caterpillars, hard-liners, tough and smiling bargainers, lawyer-politicians, nerve-teasers and others, like myself, moderate, never tried for one moment to break up. We all knew the stakes were high. Our legal consultants perhaps even worked harder as they had to listen for long hours to pompous and didactic politicians.

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From the initial reactions to the final draft by the public, including our soul-sister with blue eyes, Gwen, and foreign observers, I have a strong impression we are certainly on the right track. I want to assure the public that the draft before us is in its totality, as distinguished from a few areas where we happen to differ, a common draft, a common product of the entire committee, and therefore there is no way in which this draft in its totality can be renegotiated. It is the product of a historic compromise, or what they do in Italy "compromisso storico."

Mr Chairman, fellow deputies, the comments I am about to make here on this draft relates, as we have agreed in the committee, to -

1. points of principle on which I disagreed with many members of the committee;
2. corrections of errors in the draft;
3. omissions in the draft; and
4. improvements as a result of consultations with my colleagues in the NPF-leadership and concerned friends of Namibia.

Please do not be scared as this will not take up the whole day.

Points of disagreement in principle:

You will remember I was never happy with aspects of Article 11 - arrest and detention - and even wondered whether this whole article belongs to this constitution. In particular I was concerned with the aspects relating to the length of time during which people can be detained - subsection (4) - thirty days, or not in excess of thirty days, three months and 12 months. As far as my delegation is concerned, we can either take out this article or limit the periods from 30 days to 14 days, three months to one month, and twelve months to three months. Alternatively, if the majority still refuses to do this, then there must be a provision that if the state keeps someone for thirty days, three months or twelve months, the individual concerned is entitled to sue the state for damages if the state eventually shows no convincing reasons for the arrest and detention of people and failing to lay charges against them. Such a step would deter the state from arbitrarily arresting and detaining people and would serve as built-in checks and balances.

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The question of the need for the state to detain people for such periods because of alleged problems of manpower to deal with such problems quickly, is not convincing to me, because if the state has the ability to arrest many people at one time, it must equally have the capacity to deal with their cases very quickly.

In view of the fact that the spirit of national reconciliation is still very fragile and needs to take roots to consolidate, and in view of the necessity of those institutions which are of crucial importance to the unity of the nation to enjoy the full confidence of the entire nation in its geographic, cultural and political diversity, the NPF strongly feels and maintains that the appointments of senior state officials and officers should be subject to parliamentary approval. Therefore, the appointment of senior officials and officers, as contemplated in Article 32, page 29, i.e. the chief of the defence force, the inspector general of police, the Judicial Service Commission, the chief justice and all judges, the ombudsman, the auditor and the governor of the central bank, should be done in the following manner:

The president should only nominate these people, but parliament should approve their nomination by a simple majority in both houses or by a two-thirds majority of the National Assembly. Additionally, if the chairman and the members of the Public Service Commission could be appointed in this method I am talking about (see Chapter 1, Article 11) why should similar positions be appointed in a different way? And it is logical to act consistently, aberrations can only cause confusion. The changes contemplated here are to be made wherever these positions appear in the draft. I believe and I maintain that the Judicial Service Commission should not make these appointments alone. It is a very small circle of people, subject to a number of circumstances.

Also, the argument has been used that self-respectable people cannot expose themselves to hearings which means talking about their own personal lives. I must point out that this is part of the hazards of public office.

The NPF is opposed to the appointment of an additional six non-elected people to the National Assembly, and I said that many times in the committee. If these people are going to serve as a broadening of the base for additional political appointments to the cabinet, a problem which could have been resolved by the inclusion of people with such skills, expertise, status and experience, as it is said, in the party list of 72. The NPF can only agree to

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the appointment of the six people if they are going to represent special interest groups, i.e. the workers or trade unions, women organisations, industry, commerce and agriculture and other professional bodies. A further increase of politicians in the name of special skills and the attendant increase in the cost and space of the Assembly cannot be accepted by us.

In the section dealing with foreign relations, Article 95(1)(a), page 61, we again suggest that we add permanent neutrality to non-alignment. Whereas neutrality also contains and implies non-alignment, non-alignment alone does not. Taking into account that some of the countries in the world, which call themselves non-aligned, have been involved in international wars, as proxies of super-powers, and some of them have been oppressing their own people with the military equipment from well-known military blocks, Namibia can only avoid to be a battleground for the wars of other countries and a target for attack by declaring itself formally as a permanently neutral and non-aligned nation.

Additionally, whereas non-alignment or the wish not to belong to military blocks is showing itself to be a temporary phenomenon, when we look at events in Eastern Europe, neutrality, as proven by the affluent nations of Switzerland, Sweden and Austria, seems to be a permanent reality in changing world circumstances.

Mr Chairman, if the proponents of a version of non-alignment which rejects neutrality can convince me by declaring from this rostrum that an independent Namibia will never ever involve itself physically in foreign wars and conflicts, such as those in Angola and elsewhere, I can consider accepting a foreign policy based on non-alignment alone. If not, I shall continue to insist that we should pursue a foreign policy based on neutrality and non-alignment and peaceful co-existence between states with different social and political systems. Let me make one point very clear, as we say in the NPF-manifesto, peaceful co-existence in foreign policy shall not mean that our country will keep silent about the violations in our neighbouring countries or elsewhere in the world of the values and principles for which our country stands.

A policy of genuine non-alignment, coupled with neutrality, can also have a far-reaching effect on the size and nature of our defence and security forces.

While we have no major problem with Article 113 on the establishment of a Police Force, as we stated earlier, we are

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only concerned here with the appointment of the inspector general of the police. We have developed serious problems with what we see as the creation of a conventional defence force or army. It is true that in our manifesto and subsequent statements we advocated a defence force. However, there seems to be confusion about the defence force we had in mind. A small defensive defence force in the mode of Switzerland which can defend the country against external invasion by making the country ungovernable by the invaders is not an army in the conventional sense of the word.

Additionally, we have also listened very carefully and sympathetically to those Namibians who are totally against the creation of a conventional army. The position of the NPF is therefore to try to strike a workable balance between the reasonable security needs of the nation and the need to avoid creating a formal army. We therefore propose that the heading of Chapter 14, Articles 113 to 118, pages 68 and 69, should be changed to read as follows: "Defence and Security Forces of Namibia and Prison Service", instead of the present heading.

The defence and security forces of Namibia should essentially have police functions, to avoid giving the impression of creating a formal army and to underline the neutrality aspect of our defence and foreign policies. To this end we propose three components of our defence and security forces, namely a normal civilian police force, secondly, a border guard, some kind of ground forces and, thirdly, a coastal guard, or if you like, the so-called Naval Force of Namibia. The concept of a defensive and protective defence force and security forces does not create the image of an aggressive nation, and limits temptations to create large forces and to enable the national resources to be directed to civilian purposes. This will also allow financial room to create a developing force as some people proposed.

Armies, if not checked, can become self-propelled economic parasites, and a veritable source of political and professional problems. Creeping demands for jet-fighters, tanks and the like, promotions, higher salaries and, if you like, even suicide does take place when these things do not happen.

Since we have no intention of invading our neighbours, Angola, Botswana, Zimbabwe and Zambia and never hope to fight a successful war against South Africa over Walvis Bay, a small defence force, along the lines we proposed here, is the best option for Namibia, and I trust that our

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president will be proud to command such forces without having sleepless nights about coup d'etats and defence expenditure. The present police forces, slightly beefed-up to meet theft and other crimes in our towns and villages, and former soldiers on both sides, Plan-members as well as those others, SWATF - and the others I cannot talk about here - can keep themselves very well busy with these modest functions and could very well become happy to play this role for their country.

BUSINESS ADJOURNED AT 15h40 and RESUMED AT 16h00

MR KATJIUONGUA: Mr Chairman, now I am finished with what I regarded as issues of principle as far as we are concerned. Now I come to omissions in the document.

Article 4, page 8, subsection (7)(b): We agreed that at the end of the last sentence we should add, "after the coming into force of this Constitution". So, the whole section should read as follows:

"have served or volunteered to serve in the armed or security forces of another country without the written permission of the Namibian Government after the coming into force of this Constitution."

Article 12(1)(f): We agreed to add the word "confidentially."

Article 73(1), page 48: We agreed to add a (d) to that section which reads as follows:

"initiate legislation on matters of regional concern."

Mr Rukoro reminded us of this provision which was raised earlier in the debate. In the section dealing with asylum, Article 96, we agreed to ratify the relevant Geneva Conventions on this issue. We agreed on a time-table of at least two years for the delimitation commission to complete its work and for regional and municipal elections to take place and to elect the second house, i.e. the National Council. It was thought the phase, within five years, was too long.

Now I go to corrections. We agreed in the discussion of our first common draft, the one that came after consultations in Johannesburg, that Articles 15(2) should simply

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end with the words, "the payment of just compensation" as it stands in the 1982 Principles and should not be qualified. So, drop the rest of the words there.

We agreed that Article 44 should simply read, "The National Assembly", which is in line with a similar heading for the National Council on page 46.

Schedule 7, subsection (4) is completely wrong as far as I can remember, that the UN Secretary General will swear in our first president. It was the current Judge President who will act as if he were the Chief Justice. This contradicts Article 30, page 26 which says the oath or the affirmation of the president shall be administered by the chief justice. This applied to all our presidents, the first one included as far as I am concerned.

Improvements as a result of consultations with the leaders of the NPF and some of our friends: We fully agree to the reasons behind this article that is to do away with the death sentence. We fully agree with that. I want it to be known and understood very clearly. But we would like to remind the House to fully keep in mind the problems that might crop up if everybody thinks a free Namibia is a show for all, including real and potential killers and criminals, and what may happen if unsuccessful coup-makers kill people in the process. What do you do with them? The state must have some contingency planning for such eventualities.

We should reconsider whether secret judgments, as contemplated in Article 12(c), page 12, are compatible with due process and democratic principles.

Paragraph 2 of Article 13 on privacy might be rewritten as follows:

"Searches of the person or the homes of individuals or of associations or other private entities shall only be justified where authorised by a competent judicial officer, based on a prima face case, specifically describing the person or place to be searched."

Article 19 - Culture - needs a bit of strengthening by deleting the words "of the national interest", as this could allow parliament to give with one hand whilst taking away with the other and therefore undermine the purpose of the whole article. It is enough to have to mention that the right to exercise your culture should not impinge upon the rights of others.

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Article 21 should include a reference to the protection of academic freedom in institutions of high learning, and should make subsection (1) a non-derogable right, i.e. freedom of expression and speech, which shall include the freedom of the press and other media. I did mention this in the committee.

We should consider whether the article on derogation, Article 24, does not contain provisions which implicitly provide that a constitutional decision by the High Court or Supreme Court can be overwritten by an act of parliament lawfully enacted. I suggested in the committee that we add subsection (5) to Article 25, which will oblige Namibia to ratify international conventions on human rights, such as the International Convention on Civil and Political Rights and a number of African conventions, Algiers, Nairobi and others.

Article 26, page 23, subsection (7): It is not clear what "but only in a situation in which war prevails" means. What other war, apart from the war between countries, are we talking about? A civil war? If so, we must say it openly and write it down accordingly to have clarity.

The right of the president to declare a state of national defence - not war, we are not aggressive - must be temporary subject to a two-thirds approval by the National Assembly or a simple majority of both Houses. We do not want our president to fight unpopular wars as was the case in Vietnam and the rest of the Indo-Chinese Peninsula.

The functions of the prime-minister here are totally inadequate and clearly assume that the prime minister and the president will always come from the same party. We could have a look at the catalogue of functions, say, of the French Prime Minister. I hope the French Mission here has a document on that.

In Article 62, page 43, functions and powers of the National Assembly, we should add a subsection which gives parliament the right to approve by a two-thirds majority or a simple majority of both Houses a declaration of a state of national defence by the president.

Article 80 - Binding nature of Decisions of the Supreme Court, should be amended to add the phrase, "...in matters other than constitutional interpretation" to avoid conveying the impression that we are implicitly allowing an act of parliament to override a decision of the court in decisions concerning the interpretation of the constitution.

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Mr Chairman, the final point, the issue of the presidency. I hear from some people that we have given the president too much run-away powers. I must say I disagree. What we have done is a compromise between different interests and concerns, and I believe that the balance we arrived at is a good one.

Keep in mind that you can't have an executive president and still make him totally toothless. You cannot have your cake and eat it, an executive president is an executive president.

Keep in mind that one day one of you will become the president of Namibia and you certainly would not like to sit in a boring and useless job. What you don't want to be done to you, do not do it to the other persons, be careful when it comes to you.

And finally, Mr Chairman, I sincerely believe, as I pointed out in the committee, that before we finally adopt this constitution we should take into account the comments of our own people in the press within the short time we have and also invite inputs from the United Nations here, the OAU and other well-wishers, so that we can ensure that we make no mistakes of a fundamental nature, and that the international community, including Africa, feels a sense of comfort and understanding for what we are trying to do here. It is true, we were elected to write a constitution and not to have another referendum to ask people what they think about this constitution, but I think while we are debating, it is important to take into account those views that might be expressed by our people on this draft. Thank you.

PROF KERINA: Mr Chairman and honourable members, in rising for the first time in this august Constituent Assembly, may I on behalf of FCN express my gratitude to you and to the honourable members of the Assembly for according me this opportunity to address myself on the Draft Constitution before us. Sir, there comes a moment when honour demands an unequivocal affirmation of a peoples right to freedom with dignity in peace and justice through strength. This is such a moment for us in Namibia today.

Mr Chairman, honourable members, we all know that in war there is no alternative to victory. On the other hand, Sir, there is no alternative to compromise, accommodation and national reconciliation in the sensitive and changing

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geopolitics of Southern Africa if the fragile structure of peace in our region is to be salvaged. This is an important prerequisite to a viable Namibian future.

Sir, there could be no redemption of Namibia's best hopes unless we all sincerely play a constructive and pragmatic role in the recreation of a new Namibia. There could be no future for all our people made new, unless we begin in our own hearts with the creation of a new humane Namibian nation. Only then could the promise of freedom and independence in our beautiful country be fulfilled.

A spectrum of draft constitutional proposals were submitted to this august Assembly by all our parties, reflecting our separate perceptions. Fortunately, your representatives to the Constitutional Committee refrained from preempting what would take place at the negotiating table in the committee. Our closed mouths, for which we were castigated by the press, in public, reflected the awesome responsibility entrusted to us by the Constituent Assembly and the Namibian people. Yet, the options of our various parties had to be debated and that we did, and we did it sincerely and to the best of our abilities.

How can the lofty principles contained in our various parties' election platforms and currently reflected in the Bill of Fundamental Rights and Freedoms of the Draft Constitution before us be realised by the Namibian Government? Are they mere dreams of visionaries you have chosen? Are these lofty aims achievable? The answer to these questions can be found in the creation of a system of government that will guarantee the existence of all our people and grant them the right to co-exist on the basis of equality within a framework of political and constitutional warranties that will protect their freedoms under the rule of law. The Namibian people seek a governmental recipe that will deliver genuine non-racial and non-tribal democracy on the basis of a genuine decision-making process which prevents the tyranny of the majority and ensures that our executive branch is representative of all our people. Equality of all our people before the law, the narrowing of economic gaps between the rich and the poor through economic mobility between the developed and underdeveloped regions in our country, which would allow the laws of supply and demand to harvest the acknowledged advantages.

The avoidance of the winner-takes-all syndrome in our country that we have seen taking place in many places in Africa. Pragmatic economic policies to accelerate eco-

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conomic equality through government assistance at central and regional levels.

Mr Chairman and honourable members, freedom was the goal when Namibians fought against colonisation in the past. Freedom was the driving force when our people entered the Second World War on the side of the Allied Forces. Freedom remained the goal when our people sent the first petition to the United Nations in 1946, to be followed by your sons and daughters as petitioners to the World Organisation in New York. Your Speaker and honourable Mr Kozonguizi and the honourable president-elect, Mr Sam Nujoma, represent a historic testimony of these sacrifices. For the Namibians today, as it was then, freedom has been the bottom-line. Sir, all the Namibian people shared in the battle of struggling for freedom over the past hundred years. Our people believe in the same ideals and principles articulated so eloquently in the Bill of Fundamental Rights and Freedoms now before us. Our people believed in justice and the dignity of the human person yesterday, they cherish the same convictions today and will continue to do so tomorrow, as long as God allows the commitments of man to remain.

Experience, Mr Chairman, concern for the welfare and the security of our people, years of abuse of governmental power led all of us in the Constitutional Committee to endorse what we considered in our limited ways to be a realistic and globally acceptable Bill of Fundamental Rights and Freedoms, to discipline the exercise of governmental power in Namibia.

The Bill of Fundamental Rights and Freedoms would place the powerful instrument of checks and balances in the hands of, hopefully, an independent, learned and honest judiciary which would restrain over-reaching legislative and executive authorities.

Even though we are not satisfied with the judicial independence that we see reflected in the Draft Constitution, we are prepared to discuss, to debate and to share in that spirit of compromise which was demonstrated behind the walls of the Constitutional Committee.

Mr Chairman and honourable members, this clear recognition of the dynamism and potency of the principle of judicial independence is a glue that will preserve the co-operate existence of our nation as a single political entity worthy of the respect of the international community. Similarly, our independent civil service will be the instrument of the government of the day that will airborne

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our infant nation, regardless of the diversities of our people and political affiliations.

The structure of the Namibian Government under our constitutional mandate is more or less the same as that found in the United States, but different in one respect: Our constitution is the brainwork of your sons and daughters, it is African, in full recognition of our heritage, history, values and cultural continuity and development.

Our National Assembly will be bicameral, having a National Council of equal representation of two councillors of each region, and the National Assembly of 72 representatives, and here again, Mr Chairman, we are not completely satisfied with what we have spelled out in this document. Our position remains to be debated again in the same spirit that was expressed and reflected in the Constitutional Committee. We will continue to be dedicated to the formulation of proper structures of this constitution so that it can reflect the best of what you entrusted with confidence.

The most serious problem, Sir, about government has been the issue of utilisation and distribution of power. The question of balance of power within government and between government and the governed is the cardinal issue of how government actually operated in reality rather than as a theory. Your representatives tried their utmost best to see that the constitutional draft before us can at least take us out of that limbo of theories into the practicality of today's world. A great deal has taken place and continues to take place all over the world. Empires are crumbling, the eastern world, that some of the honourable members referred to, is now involved, in our lifetime, in the reformation or reform of new systems of government, democratically responsive to their people. As we sit here to establish a new independent nation, as the last country in Africa to gain that independence for which all of us have suffered so much, we will look around the world and see developments all over Africa, see developments all over the eastern world, see developments in the industrial world where new interests and new values are being evolved, by young people, by old people, by middle-aged, by poor, by rich, all of them returning to the same cradle where it all started.

Mr Chairman, I hope that the Namibian Government will differentiate itself by being responsive to the need for all to participate in the democracy in our country, to minimise fractionalism. The government must always seek both national benefits of governed people and conscien-

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tious representation of the broadest interest of all our people, so as to refuse the corrupting influence of sectional power and the corruption of general powers of government.

Implementation of the national responsibility on the part of the executive branch involves similar functions. Unfortunately for us in FCN, provisions relating to the question of the presidential accountability to parliament, in accordance to the principles of 1982, cost our party to reserve our position on this issue.

I do not to recite the catalogue of the reservations already expressed by my former colleagues who spoke before me, honourable Mr Katjiuongua, honourable Chief Garoëb, honourable Mr Muyongo and I am sure others to follow. All that I can see at this moment is that we will be ready to stand there, because their reservations are also our reservations.

Sir, it must be clearly stated that I impugn the integrity of none in this august Assembly, and I do not expect our first republic to be made of angels since they are all human beings. My emphasis is that when dedicated leaders of our infant republic, endowed with a sense of vision, patriotic vision, inspiratory imagination, assume the reigns of our government, they must not fail to read the handwriting on the wall of the Namibian destiny. If the stated provisions of our constitution are realised over the future course of Namibian history, they will guarantee democracy for all our people and security for our young nation.

Mr Chairman, honourable members, one of the most important phenomena of history is coming to its culmination. Suddenly, as if there had been no previous warning, like lightening from the sky, the independence of Namibia has dawned. There is a sensation of amazement, along with a host of innermost impressions associated with the impact of this development world-wide. Everywhere people are asking for a map of Africa to locate Namibia. Diplomatic networks are seeking to connect themselves with Windhoek. The various threats of global politics have made an appearance in our country, only to bow to the extraordinary and unique mystique of Namibian nationalism. Nobody who knows or who visited Namibia will elude the irresistible hypnotic magnetism of our country and it is but natural that this attraction should now spread to all parts of the world. The feelings we experience at this point flows from the fact that developments in Namibia, aside from speaking for themselves, are at the same time

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the ultimate episode of a great human drama, that drama that has already been referred to by my associates.

At this moment I would like to express my gratitude to all the members of the Constituent Assembly and especially those of the Constitutional Committee. They gave me an opportunity to know them after many years of separation. They gave me an opportunity to share with them our hopes, our aspirations and expectations. They demonstrated to me their abilities, their understanding of the intricate constitutional principles that we dealt with in that committee and above all, Mr Chairman, may I express my deep appreciation for your ability and your sensitivity regarding the manner in which you managed the most difficult position of a chairman in a committee that sometimes was ready to throw in the towel, developments that never had the opportunity to reach the press. You guided the ship until we reached the halfway junction in the Constituent Assembly in order to hear the final verdict of this Assembly. We will be second to none in making our best contribution to this enterprise. I thank you.

ADV RUKORO: Mr Chairman, honourable members, I shall make no statement on this occasion, I shall reserve my right to make a comprehensive statement at the conclusion of the debate on the Constitution. At that stage I will relate my experience in the standing committee and I will share with you our hopes and dreams for the Namibia of tomorrow. Whatever reservations we might have on some of the provisions of the Draft Constitution, we shall state them and we shall argue them right here in the Assembly when the Assembly starts to discuss and debate the Constitution article by article. So, it is at that point that we are going to state our reservations and argue them out.

Finally, I would appeal through you to our people, namely the general public, that now that the draft has become a public document, they should seize this opportunity to study it very carefully and thoroughly and to make appropriate comments and recommendations so that they can become full participants in the drafting of our independence constitution. I thank you.

ADJOURNMENT OF ASSEMBLY

On the motion of the Chairman the Assembly adjourned at 16h45.

CONSTITUENT ASSEMBLY

ASSEMBLY CHAMBER
WINDHOEK
30 January 1990
14h15

The Assembly met pursuant to the adjournment.

RESUMPTION OF DEBATE ON CONSTITUTION

PREAMBLE PUT.

MR KOZONGUIZI: Mr Chairman, I just want to get some clarification. My understanding was, at least when it comes to the Preamble, one would have to say a few words rather than just amending it, except when it comes to the articles where you may amend or alter them. I don't know whether I understand you correctly.

CHAIRMAN: The Preamble was already agreed upon in the committee, and in the committee I was told we will not debate on the Preamble.

MR KAURA: During the Whips' meeting for the last two days, it was agreed that during the Preamble, given the fact that we are dealing with a historic document, we would avail the members the opportunity to express themselves on the Preamble as it is stated that this is the moment when the people of Namibia have finally broken the shackles of colonialism and racism, and this was the understanding during the Whips' meeting and it was to be conveyed to you as such by the Secretary. It is unfortunate that perhaps this message did not reach you, and there are members who have already prepared to clean their chests, especially during the Preamble, before dealing with these things article by article. If it is possible we would like to be availed that opportunity.

MR KOZONGUIZI: Thank you Mr Chairman, what I say here does not take away from the position which the DTA has taken on the Draft Constitution. I am going to confine myself to the Preamble, but as it is, because it is a very general thing, it may be that here and there I might quote from some articles, but that does not mean that I am opposed to the Draft Constitution as such, or necessarily, that it is the position of the DTA.

The Constitution is the fundamental law of a sovereign and

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independent republic. Everyone, to start with, should ask themselves whether, as the Preamble states, they have been part of the struggle against apartheid, racism and colonialism. Of course, the order I prefer is colonialism, racism and apartheid. In this I have to go back forty years.

I have lived with this struggle from 1950 to the present day, 1990, that is being personally involved in one way or another. Before that I had heard of the activities of Chief Hosea Kutako and his contacts with the Rev Michael Scott. In 1948, before going to school in South Africa, I worked in the office of the then Native Commissioner where on South African election day I heard young Afrikaners in the office - one I remember was a Tiekie Blaauw who was playing rugby for Windhoek High School and the United Rugby Club - exclaiming: "Julle baas, Korujezu," meaning the beard of Genl Smuts, and he used a swear-word with two k's. He impressed on me that with all the Afrikaner Prime Ministers in South Africa since 1912, it was only then that the Afrikaner felt he was free at last, i.e. with the accession of Dr Malan to power in South Africa. It was really true that we were not part of South Africa. I realised it. Chief Hosea Kutako and Rev Michael Scott were right, the battle of Genl Smuts before that to incorporate us into the Union of South Africa and subsequently Dr Malan's defiant attitude towards the UN, became meaningful to me. Every lunchtime with Mburumba Kerina we visited Erwin Tjirimuje, now a pastor of AME Church, whom I saw last night at the Chairman's reception, at his work at Hirserkon & Miller, attorneys. There we discussed politics and read South African newspapers, especially articles written by Mr Jordan Ngubane in the "Forum".

Come 1950, we left for South Africa to study. Inbetween school terms we organised students into the South West Africa Student Body...

MR ANGULA: On a point of order. With due respect to honourable Kozonguizi, I think we should clearly define what we want to do here. If we are going to address ourselves to the items on the Preamble, we do so. If you want to open a debate for general statements about our history and experiences, we shall also decide to do so. But at least we must decide one of the two, not to do both.

CHAIRMAN: I have asked a question and I was told a general debate, there will be no limits on the Preamble.

MR KOZONGUIZI: Thank you, Mr Chairman, and for the sake of

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the honourable member I am confining myself to what is in the Preamble. It is only that I am expanding on it.

Here I recall that Zed Ngavirue, who is due to become chairman of the planning commission, was then at the Augustineum, where he ran into trouble with the principal, a certain Mr Steenkamp, I suppose after whom the Katutura Steenkamp School was named. Those years we remained in touch with Chief Hosea Kutako and we matured to join in his council. It is there where I came across the man to become the first President of the Republic of Namibia, that is Sam Nujoma. Amongst many other missions we had together, I remember the two of us deciding to see the then Bishop of Damaraland. Somehow by a clever ruse, the South African Government had manoeuvred the Rev Hamtumbangela to be transferred to Windhoek because he was being politically active in the North. We told the bishop that he had allowed himself to be used by the South African Government to do their work by transferrring Rev Hamtumbangela to Windhoek. The following day the Reverend Gentleman was provided with a train-ticket to return to the North.

Yes, indeed, Mr Chairman, I had been part of the struggle against colonialism, racism and apartheid. That is what is in the Preamble. And Mr Chairman, I was in South Africa those years of the defiance campaign of the Congress Movement in 1952. Talk of all the big names of the ANC today, they were there, they inspired us.

Not only did we concentrate - and this is a historical significant fact - in our struggle on blacks as blacks, but we also took note of the whites who were progressive at the time and who made overtures to us. I had friends in the German community. I had a Mr Peter Heck, later to become an architect in Windhoek, Frankfurt and the Middle East, and his father was a principal of the German High School here, and when he was in Swakopmund during Christmas holidays we used the house for our meetings.

Another friend I remember was Ilse Beurger, I think her sister is a Mrs Cloete at the Academy. She is now in London, married to a Nigerian. Of course, Uatja Kauketu was there. I will still come to the most interesting parts.

Mr Chairman, I cannot fail to mention Smittie of the "Windhoek Advertiser." At the time he was working at Windhoek Universal with John Muundjua, today of NPF, and at that time, I remember in South Africa, I was to hear how Congress people, like the late Adv Duma Nokwe, Walter Sesulu, Ruth First and others, had been to China without

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passports. Hence the South Africans passing the Departure from South Africa Act, 1955, prohibiting people from leaving South Africa without passports. But it was Smittie - and that is why I remember him - who through John invited me to my first dinner at a white man's house in Windhoek, who dramatised to me the rise of China as a big power. He told me that night: "The people think Russia is the danger, but I tell you my friend, watch China."

Later in life I was to be impressed about this, at that time to have come from a man who, from what I was to read later, was a bare-footed little Boer from Grootfontein, where he hardly had any proper education for a white man. I am glad that with him, I hope, as a giant and fearless journalist today we shall together celebrate the victory of the people of Namibia for better or worse.

Now, Mr Chairman, to bring the fifties to a close, I can never be historically happier than with my experience in the ANC, not only at Fort Hare but also in Cape Town. The story of Andimba Toivo, the man to be in charge of the Ministry of Mines and Energy has been told, but apart from the story of the Ovamboland People's Congress and a Cape Town crowd of South West Africans at the time, Timothy's Barber Shop and all, I remember him as not only the man I stayed with whilst a student at Cape Town University, but together the two of us are indebted to that great Communist, Dr Simons and his wife, Ray Alexander, who had been a trade union organiser in Luderitz, for a valuable political education in Marxism-Leninism at their house in Cape Town. Uatja Kaukuetu told me that his father had been her member when they lived in Lüderitz.

With Toivo, when he was deported from Cape Town, we travelled together. And there it was at Wellington that Libertine, now the shadow Minister of Housing, and the late Anna Kahuika got onto the train. They were at high school in Wellington. If you try to calculate Libertine's age by what I am saying now, I should think that she would accept that these are the hazards of public life. I will not relate the story further, except that we stopped at Keetmanshoop and then came to Windhoek.

Mr Chairman, I won't go into the development of the National Liberation Movement, what happened to Toivo later and Sam, the United Nations, to Kerina and the history of Swanu and Swapo, but let me mention that as you know, sitting in this House - some people say I should be ashamed to say it - it is pleasant to find that in the struggle I know more people on the opposite side than on this side.

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To be old is to be nostalgic. For me to sit opposite David Meroro, who I see is not here, I remember him playing tennis with my brother and doing politics with Chief Kutako and there is Pastor Witbooi from his Wilberforce days.

Mr Chairman, as the people of Namibia emerge victorious in the struggle, I would like to go on record here that to my mind I have three people in my life who I think deserve to have an honoured place in the victory of the Namibian people, and that is Sam Nujoma, the man has never looked back ever since he took the first steps in the struggle. Mistakes he may have made, but you can't take away from his dedication, devotion and determination in the struggle as it turned out for better rather than for worse. Herman Toivo had never had a moment on his own ever since the Special Branch followed him from Cape Town station that evening in December 1958. Detained in Tsumeb, house arrested by Kamonde in Ovamboland and ultimately going back to Cape Town, entering not UCT, but the "University of Robben Island" - the university which I used to be told by South Africans was for men, "Amadoda" - that is the university of men.

I regret that Hitjevi Veii has not been able to join this historic Assembly. That man, with all the brains and qualifications to enter any university, has never used that to divert him from the struggle. In the end he registered against his will at the "University of Robben Island."

Mr Chairman, there are many heroes in the history of the struggle of the people of this country, be it in the distant past or more recently. They deserve to be honoured, but I shall not go into that now.

Having related to this, my humble, indeed, very small part in the struggle, let me turn to the rights as mentioned in the second paragraph of the Preamble. In paragraph 3 we are told that "the said rights are most effectively protected in a democratic society." Without discussing Article 17 of Chapter 3, let me add to this the words that reverberate everywhere where democracy is mentioned, and these words are "as would be acceptable in a democratic society." Our people must be clear about this "democratic society" in which they will exercise their rights. Is it according to the British society, American society, French society? These days we hear democracy is coming to Eastern Europe. Is that the democracy we are aiming at in our Constitution?

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The honourable Hidipo Hamutenya the other day spoke of the battle in Eastern Europe being for democracy and not against socialism. I agree things like dictatorship, bureaucracy, fascism, apartheid and so on must be broken down, but my theory is that what in Eastern Europe may look like reform, could turn into capitalistic anarchy, as all the socialist achievements, even under those dictators, could be prostituted for some decadent, western values. Our people must be warned. It looks as if the only achievement of the Capitalist Revolution in Eastern Europe is the creation of political parties with no defined interests except to replace whoever was there.

Peregrine Worsthorne, a right-wing British journalist, in the "Sunday Times" of 28th January, last Sunday, warns "that civil war and national antagonism in Eastern Europe could pose a greater threat than communism."

The point I want to make here is that our people, in competing for western investment and aid, may be tempted to emulate Eastern Europe. They should be warned.

In our endeavour to seek direction, we must not forget those countries that by nature of their revolutions are closer to our conditions. China has for a long time been the scourge of western self-righteousness, but the Chinese have stood steadfastly for Marxism-Leninism, Maoism, socialism. These may not be our goals, but their discipline to stand for their principles can teach us a lesson. Discipline is the only way in which our rights can be protected in a democratic society, not capitulation to other people's values. Perhaps under the chapter on state policy the issues of capitalism, socialism, mixed economy will be discussed. Many of us may wish to play up to the western gallery "in the pursuit of our happiness." Well and good, but remember Comrade Gorbachev's glasnost and perestroika. The West applauds these. We may also embark on policies that please the West. But "to promote the unity and the integrity of the Namibian Nation" and "to protect the gains of our long struggle," as we say in our Preamble, we must guard against divisions amongst our people which may be instigated from outside. Whilst "perestroika and glasnost" may be welcome, we note that the integrity of the Soviet Union is being undermined. Break-away movements in certain republics are being supported in Luthuania, Latvia and Estonia and maybe Azerbaijan.

The lesson for us is that whilst our economic and social policies may be applauded elsewhere, the same people or others may be supporting ethnic movements in Okakarara, Ovamboland, Caprivi, Kavango, Damaraland to destroy the

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integrity of the Namibian nation. Again it must be clear to our people, whether a democratic society in which the said rights can be protected, is necessarily that in which exists a multi-party system.

I note that the 1982 Constitutional Principles provide for a Constitution in which multi-parties will be sort of entrenched and that, if I remember well, is the policy of the DTA. But in their wisdom the draftsmen of our Constitution vest the right to form or join political parties in the citizens, i.e. Article 17. I submit that this is correct because the existence of multi-parties in the society or state does not in itself promote democracy. It is my view that where the party, by the democratic rights of existence, should engage in intimidating rather than persuading people, against our legally established authority, it is not acting in the pursuit of democracy and the right of such a party to exist, in my view, should be forfeited.

Thus I submit that the absence of a second party or other parties than the governing one under such circumstances cannot reduce the system necessarily to become undemocratic. Thus our people must understand that a multi-party situation is not a prerequisite for democracy, but the infringement of the right to form a political party is a vital element of democracy.

Furthermore, I want our people to know that logically political parties represent interests and such interests should be democratically definable and the measures to promote such interests, implementable. In our young nation, guarding against the destabilisation of the integrity of our nation, the people must distinguish between real interests and phony ones. In politically advanced societies the interests of the people become so diversified to be reduced to issues amongst them and between political parties. For example, in the UK, the USA, Sweden, the interests are sophisticatedly easy to define, hence the formation of political parties against the governing party.

Mr Chairman, it is important that in our new nation we must clearly define what our interests are to justify the formation of a political party. Even the governing party must define its interests clearly, as distinct from the previous interest of prosecuting a struggle towards the attainment of Independence. Now that we have finally emerged victorious from our struggle we must ask: "What are we to do?"

The opposition here has been born out of a common interest

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with a government there, that is to attain the independence of Namibia and the right of self-determination of her people. Mrs Ithana, note, it is "her" people, not "his." The difference is that the government's side felt that an armed struggle was necessary, whilst the opposition felt negotiations with South Africa had not been exhausted. The interests on the government's side were clouded by UN and other external influences, whereas those on the opposition side were influenced by South Africa.

Now that the country is free, the parties must define their interests afresh. At the same time the interests of the people must be redetermined. In defining the party interests, you may find that in a free nation the interests of the former Plan-combatants, who spent many years in the bush, are not the same as those of the Swapo-teachers who spent most of the time with teachers of other political persuasions in a classroom, except of course where it comes to supporting Swapo.

You may find that on the DTA-side a successful farmer, capitalist and above all, a man of independent means, who joined the movement against South African wishes to attain independence, having been together with a location-born, socialist, and above all, a wage-earner inbetween jobs, living on political handouts without security. Will these two really have the same interest in a new Namibia except to oppose Swapo?

It is very nice to please the West by saying we are having a multi-party system, and they will tell us to keep it that way under any circumstances. But if you look to what I have been relating about myself, you will find that my whole life was spent in the struggle for the attainment of independence, and now that independence is here, what am I opposing? Indeed, there are many things I can oppose, but is it really fair to this country if in a free nation to spend time defending phantom interests, if you can spend your time positively working for the country? Whoever said that people working for the country only meant being in politics? In fact my submission is that those on the Government's side (to be) must ask themselves, does the fact that I have been a good freedom fighter mean that I can be a good administrator? Will it be in the interest of the country and/or the people?

Members of the opposition must ask themselves, having opposed what now has become the choice of the people as the Government of Namibia, on a point of methods, and now that through both our respective efforts independence having been obtained, should I continue to oppose Swapo for the

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sake of opposition, is there any other constructive role which I can play in the interest of my country?

What I have tried to say in so many words is that my view of democracy is that it gives the right to anyone to define what he considers to be democracy in his society. Thus to us is given the right to define democracy not necessarily as would be acceptable in a democratic society as defined by the French, Americans, Russians, Chinese, Zambians and so on, but by Namibians taking into account the interests of the Namibians, national, sectional or individual.

Talking about interests, by the exigencies of history today we are confronted by a situation and a reality where in the main, promotion of interests applies to Black interests, and the defending of interests will apply to white interests - those previously disadvantaged and those previously privileged. It does not mean that black interests will be promoted only by Blacks and White interests only by Whites, but now as a Namibian, please take your pick.

In conclusion I should return briefly to my own role in politics in this country, which I regard as having been pleasantly controversial. Whatever I have done in pursuance of my politics has been for this country and in the interest of my people. I may have regrets here and there, but nothing to apologise for. Personally I have had my political initiation, as I have said before, in the ANC in South Africa. Ideologically I have formulated and pursued the Swanu-line, patriotically I have respected Swapo: controversially, to bring the most conservative White and indeed, the Blacks from the homelands to understand the struggle of the black man, I have worked with Dirk Mudge within the DTA. One of my regrets was to read the other day in the December 1989 issue of "Frontline", a South African magazine, the following:

"Well, look at the Namibian election. There outside Ovambo the DTA beat Swapo, a 90% Black electorate cast more votes for Namibia's equivalent of the De Klerk's National Party than for the glamour Party of Liberation."

I stand here, Mr Chairman, equivalent to De Klerk's National Party, that is what we are said to be. Talking about interests, to promote or defend, this is one of the hazards of political life, as I have experienced, and I thought it was important that the House should share these thoughts of mine. Aluta Continua.

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MR DE WET: Mr Chairman, honourable House, in the first instance those brotherly remarks made by the brother Chairman was brotherly accepted.

Allow me a few general remarks before I come to the Preamble. In the first instance I would like to convey my appreciation and gratitude to the Standing Committee for producing the most important document, determining the future of his country and the generations to come. At first it seemed to me an almost impossible task to co-ordinate the constitutions of the different political parties to the satisfaction of everybody and eventually to reach consensus. According to the representatives in the committee, Mr Chairman, you have handled the meetings with skill, but with determination to come forward with a constitution in a comparatively short time and so you did. My congratulations and appreciation to you, Mr Chairman.

I regard this constitution and the adoption thereof as the most important task of the Constituent Assembly. Therefore we must ensure ourselves that every word, every sentence, every clause in this constitution must promote our purpose of establishing an independent Namibia, where we wish to nurse our finally conquered independence and where the constitution must serve as the foundation whereupon we build the structure of a new nation with a common loyalty and on the principles of freedom, unity and diversity, collectivity, democracy, justice and equality.

It is my considered opinion that the draft now under consideration represents significant improvement on the original draft.

It is also encouraging to experience the spirit of co-operation between the parties in the Standing Committee and the determination of everyone according to his conviction to establish and maintain a democratic constitution and a political system in Namibia.

We believe that with due regard to the 1982 Principles, the basic objective of a constitution of this nature is:

- (a) to establish a unitary, sovereign and independent state, to identify its boundaries, to allot a name to that state and to describe its system of government;
- (b) to provide for the establishment and constitutional powers of a sovereign legislature, an executive consisting of a central government and a system of local government, accountable to parliament and an independent judiciary;

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- (c) to identify the fundamental rights of all human beings which irrevocably be entrenched against any action by the legislature, executive and judiciary encroaching upon such right; and
- (d) to provide for matters incidental thereto.

The constitution to be passed by the Constituent Assembly should therefore, in our respectful submission, not contain provisions which -

- (a) deal with matters which fall within the powers of the new government to be decided upon as a matter of policy, and which may vary from time to time, depending upon the policy adopted by the existing and future governments;
- (b) contain statements of policy of any particular political party or group;
- (c) contain provisions in terms of which unconnected matters are regulated, which should be matters for the new legislature to decide upon as circumstances may from time to time require.

As a fellow-Namibian and colleague in the Constituent Assembly, and in the spirit of reconciliation and co-operation, I would like to call the attention of this honourable House to a few points of concern, and will, in an attempt to be helpful, and in order to abridge the problems identified by us, propose amendments to certain clauses.

Mr Chairman, my party wants to build, we don't want to destroy; we want to be positive, we don't want to be negative. There is a challenge and the challenge is to meet the demands, expectations and fears of the inhabitants of this country of ours. This government, or the incoming government, must establish the credibility and govern and create future faith. Therefore we would like to make a few recommendations.

In the first instance, according to our adviser, Adv van der Byl, this Draft Constitution is, in our respectful submission, subject to defects from a legal drafting point of view, and therefore we would like to suggest to this House to co-opt Adv van der Byl to assist the legal constitutional advisors of the standing committee so that he could be of assistance in editing this Constitution out of a legal point of view, and I think that is a fair request from our side.

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Then we would like to draw the attention of this House to the following fact, that it is common practice that laws passed by legislative bodies are generally provided with a long title, and secondly, although generally acceptable from a political point of view, it is based on a wrong assumption that on the day immediately before the commencement of the Constitution, there existed from a legal point of view a place called Namibia, in that in all the existing laws and therefore from a legal point of view the country was always known as the Territory of South West Africa, so that it seems desirable that a clause be worded in such a manner that the name Namibia is expressly allotted to the new state.

We hereby move that the Draft be provided with a long title to read as follows:

"Constitution - to grant independence to the territory known as the Territory of South West Africa under the name of the Republic of Namibia as a sovereign, unitary and democratic state;

to introduce a bill of fundamental rights to provide for the establishment of a legislature, an executive and a judiciary; and

to provide for matters incidental thereto.

That is as far as the long title is concerned.

Now I want to draw your attention to the Preamble, and what I am going to say about the Preamble is going to be very sensitive, and in saying this I do appreciate your sentiments, but on the other hand, I also have sentiments, Sir.

Although we accept, as resolved by the Standing Committee, that the Preamble should reflect the historical context of the birth of the new state of Namibia and the aspirations of its nation, we do not accept, as it is partly done in the draft, that the Preamble is the place where political views or bitterness of only one or some of the political parties or disputable historical facts are reflected, such as the rights which the inhabitants, or some of them, have allegedly been denied, those who have struggled against whom and who were victorious in such struggle.

Mr Chairman, as far as I am concerned, this is also a sensitive matter for me personally, because I don't know how this House regards me as one of those people who had established apartheid in this country, and what I have

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done I have done in my conviction, and as commissioner general I am today proud of what I have achieved with the people of those areas as far as development is concerned in general, whether it be political development, educational development, economic development or social development, and what I did, I did with enthusiasm, and now we have come to the point where we recall history and never come to the point of reconciliation.

Therefore my humble request today is that those matters which are political and with different points of view should, in our respectful opinion, in the spirit of national reconciliation rather be omitted from the draft. My request is that paragraphs 4 and 5 be omitted from the Preamble. That is a request in the spirit of co-operation, in the spirit of reconciliation and for the future of this country. I thank you.

MR KAURA: Mr Chairman, I would also like to clear my chest.

This is a sober moment in the history of our country and it is necessary to stand still to take a backlook at the road we have travelled to this point in time where we finally emerged victorious in our struggle against apartheid, racism and colonialism, as it is stated in the Preamble. We have come a long way from the banks of the Gammans River in 1947 when the first petition was scribbled on a piece of paper and handed over to the late Rev Michael Scott to take to the United Nations. That is the road we have travelled to the point where we have finally arrived. We have arrived at the point where Namibia is going to join all the independent nations of the world. I wish the late Rev Michael Scott could be here today to see the culmination of his labour.

Confusius, a great Chinese philosopher, once said that to see what is right and not to do it, is want of courage. Rev Michael Scott saw what was right to do and because he had courage he never hesitated to do what was right.

Yes, we have come a long way to this point where we are looking at this beautiful document, from the battle of Amakari to that fateful night of December 10, 1959, when some of us in this august hall underwent the first baptism of fire, to Ongulubashe, to Cassinga and finally to this sober day when the children of Namibia, black children, white children and brown children, are dealing with a

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historic document which we hope will endure for many generations to come. It will be a serious historical omission, however, if we don't show gratitude to our fellow-countrymen who paid the supreme sacrifice on the road to independence, some with their lives, as well as brothers and sisters in Africa, Europe, Asia, the United States, Canada and South America. This is a moment for us Namibians to show our deepest gratitude, however, to the father of our struggle, Chief Hosea Kutako.

In 1947 when he sent the first petition to the United Nations, he opened a meeting in Gobabis with the following prayer and he said:

"Dear God, the foxes have dens, the birds have nests, but the children of mankind have no place to lay their heads."

We would like to tell the late Chief Hosea Kutako that today finally all his children have a place to lay their heads. There are those of Hosea Kutako's protégés to whom we should show our deepest gratitude for their contribution to the independence struggle, men such as late Clemens Kapuuo, the president-elect, the honourable Sam Nujoma, the honourable Adv Kozonguizi, the honourable Prof Kerina, the late Bethold Himumuine, the late Hatja Kulkwetu, the honourable Naftenial Maxilili, the honourable Chief Riruako and many others.

If we look abroad, I would like us to remember the men who said in 1957 that Ghana is not free until the rest of Africa is free, and that is Dr Nkwame Nkrumah. I would like to say at this moment, Dr Nkrumah, wherever you might find yourself, the last colony on your beloved Africa is finally gaining its independence. It is breaking the shackles of colonialism for ever.

Fellow Namibians, an independence struggle can be compared to the building of a reef by those micro-organisms, building a reef with their skeletons from the bottom of the ocean up to the point when that reef is going to serve as the most important supplier of food to all the organisms, big and small, in the ocean. Every hand, every voice which rose in rejection of apartheid and colonialism made a contribution. Fellow-Namibians, can we forget Mrs Angie Brooks of Liberia, the late Haile Selassie, Dr Mwalimu Julius K. Nyerere, the late Gamal Abdul Nasser, the late Jomo Kenyatta, Dr Kenneth Kaunda, Dr Houphouet-Boigny and the late Sir Seretse Khama? No, we can't forget them. They have made a contribution to make it possible for us today, the people of Namibia, to say that we have finally

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emerged victorious against colonialism, racism and apartheid.

For many years we, the children of Namibia, held different views as to what should be done to bring independence to Namibia. Some Namibians wanted all the children of Namibia to be judged on the basis of their contribution and the content of their characters, rather than on the basis of sex, race, colour, creed or ethnic origin. If we must make a new beginning let us remember history correctly and not be ashamed of it. Some exhausted all the vocabulary in their native vernacular to justify the separation of the people of Namibia on the basis of race and colour with words such as apartheid, parallel development, separate development and finally, of late, "eie sake". However, today Namibia is one and indivisible.

There is a saying that one should not judge someone harshly who is disagreeing with you, because he is perhaps marching at the beat of a distant drummer. We have all been marching at the beat of distant drummers, but today we are all marching at the beat of a single drummer, and that is the people of Namibia, who have entrusted us with the task of producing this historic document before us. Let us not fail them.

This is the moment for the people of Namibia to beat their swords into plough-shears and their spears into pruning-hooks and make no more war for ever. It is now the time to get on with the business of nation-building. It is the time for the people of Namibia to lay down their buckets, wherever they are, and make friends with their fellow countrymen and women. I am encouraged by the attitude of my fellow-Namibians when I meet them outside there, on their jobs, in their homes, on the roads and anywhere throughout our vast country. They are at peace with one another. Let us make that peace enduring.

I trust that our people will never be polarised again. Arogance, selfishness, nepotism, racism, sexism should be eradicated from our society for ever. The Bill of Fundamental Rights, as contained in this historic document, should be internalised by all Namibians, in particular the leaders, and live by it like the Ten Commandments.

When we start dealing with this historic document article by article I shall make some further contributions, but for now I would like to thank you and the committee for a job well-done. Let us begin, the time is now. Thank you.

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MR HARASEB: Thank you, Mr Chairman, I want to contribute under the clause:

"Whereas the said rights include the right of the individual to life, liberty and to the pursuit of happiness, regardless of race, colour, ethnic origin, sex or religion, creed or social or economic status."

Mr Chairman, honourable members of the House, brothers and sisters, countrymen, I thank you as we approach the long-awaited independence of our beloved country. Brothers, it is perhaps proper to remind you that the vast majority of the Namibian people was not privileged to have their education through English. Therefore, please allow me to speak in Afrikaans for better understanding, for the sake of the people of Namibia.

Dames en here, baie mense voel en wil graag sien dat ons nie oor die verlede moet praat nie, maar bloot oor die onmiddellike toekoms. Maar ek glo andersom. 'n Mens behoort die foute van die verlede te identifiseer om hulle in die toekoms te kan vermy. Die werklike kolonisasie van Namibië het sedert 1884 met die Duitse besetting begin en as ons nou na die syfers kan kyk, dan beteken dit dat hierdie land 114 jaar gelede uit die hande van die werklike mense gegaan het en sedertdien was die menseregte van meestal die swartmense in Namibië op die spel.

Om net te kyk na een van die probleme, die grense van Namibië was in 1890 arbitrêr, sonder dat die werklike eienaars geken was, beslis tussen die Portugese, Duitsers en die Britte, maar kom ons aanvaar dit. Suid-Afrika het eers in 1920 op die koloniale toneel verskyn.

Daarom, broers, is dit 'n baie geskiedkundige tydvak wat ons vandag inlei. Vir die eerste keer voel ek soos 'n mens wanneer ek aan die bespreking van 'n wet deelneem, omdat dit nie 'n wet is wat nie spesifiek beperk word tot 'n groep nie maar in nasionale belang.

Ek het opgestaan, nie om hierdie saad wat ons besig is om te plant of die boompie wat ons geplant het te vernietig nie, ek het opgestaan om dit te ondersteun. Dit is nie 'n party-grondwet wat ons skryf nie, dit is 'n landsgrondwet, 'n grondwet waarby die seuns en die dogters van Namibië moet staan en val.

Daarom wil ek vandag 'n beroep doen op die kinders van Namibië. Hierdie grondwet is vandag op 'n papier geskryf, maar ek wil 'n voorbeeld noem van 'n grondwet wat al die kinders van Namibië ken, van die Kunene af tot by die

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Oranje. U weet, wanneer die werklike kinders van Namibië bymekaar staan, dan sien jy gewoonlik tussenin gaatjies wat daar sit en in daardie gaatjies sit klippies en almal ken daardie spel. Al ken hulle nie mekaar se taal nie, speel hulle saam wanneer hulle rondom daardie klippies staan en daar is net een ding wat 'n rol speel en dit is die wet wat daar gehandhaaf word. Almal weet wanneer hy moet vat en almal weet wanneer hy moet afgee en daar sal nie gestry word nie, daar word gewoonlik saam geëet en gedrink. En wanneer hulle uitkom, dan is die mense bly. Maar weë die man wat speel, hy word uitgevang. Ons noem daardie spel in ons taal, "Hus".

'n Grondwet is niks onbekends in Namibia nie. As ons daardie beginsels neem, dan sal ons by die punt uitkom. Ons almal het swaargekry in die verlede. Ons voorvaders het die prys betaal. Dames en here, u wat die gewapende militêre stryd buite die grense van Namibië aangepak het, ons wat die vreedsame stryd binne die land aangepak het, ons almal was die slagoffers van die gehate beleid van apartheid en diskriminasie. Kom ons admireer die manne wat hul lewens in die stryd verloor het en ek wil hier beklemtoon, dit was nie net die swartmense wat onder hierdie beleid swaargekry het nie, baie van ons geesgenote en landsgenote wat nie swart is nie het ook onder hierdie proses swaargekry. Dink net vandag, as u kyk na hierdie Vergadering, hoe swaar sou dit vir mnr Mudge gewees het as hy nie in 'n posisie was om saam met my om 'n tafel te sit en eet nie, en ek kan vandag met trots vir u sê dat ons wat die vreedsame stryd hier binne die land aangesê het, het ook ons probleme gehad. Dit was nie aldag maklik om voor jou superieur op te staan en hom te wys op sy foute nie, waar jy nie geweet het nadat jy dit gesê het wat gesê moet word, wat jou lot sal wees nie. Maar ons het moed bymekaar gekrap, ongeag daardie slaaf-mentaliteit wat ons lank sal neem om af te skud. Landsgenote, dit is die sielkundige effek van die stryd waarmee ons doenig is. Die nuwe proses van opvoeding moet kom om die mense van Namibië te leer dat vryheid aangebreek het, maar om hulle ook op te voed dat vryheid nie wetteloosheid beteken nie, dat my vryheid ook die vryheid van my broer, hoofman Dan, is, en hoofman Dan se vryheid is my vryheid en ons moet jaloers waak oor ons vryheid en regte sodat ons nie weer terugval in die verlede nie.

Ek is so bevrees dat daar vandag in hierdie grondwet voorsiening gemaak word vir aanhoudings, want ons het in die verlede so swaargekry onder die aanhoudings, en daarom dink ek ons in Namibië moet waak dat die toekoms nie ook gekenmerk sal word deur wrede aanhoudings en martelings

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nie.

Dames en here, kom ons waak jaloers oor hierdie grondwet. Wat is ons rol as opposisie wat ons moet speel? Ons het ons jare opgeoffer vir vryheid, daarom is ons nie hier om vryheid en onafhanklikheid te opponeer nie. Ons staan ook nie hier om die grondwet van die nuwe Namibië en die veranderinge te opponeer nie. Ons staan hier om te waak dat ons vryheid behoue bly vir ons nageslag. Daarom is ons vandag hier om te help bou aan die grondwet vir die nuwe Namibië.

Baie van ons wat in hierdie Huis sit, weet nie wat werklike vryheid beteken nie. Dit is miskien hoekom daar so 'n groot vrees rondom vryheid is, maar glo my vry, aanvaar dit. U weet, ons almal, die Namibiaanse kinders is tog as Christene grootgemaak en ons weet toe die geboorte van Christus aangekondig is, was die eerste woorde wat die Engel gespreek het na hy na die aarde gekom het: "Moenie vrees nie." Hoekom het hy dit gesê? Omdat dit menslik is. Ons weet nie almal wat hou die toekoms vir ons in nie, daarom vrees ons, daarom is dit menslik dat die mense van Namibië vrees vir die toekoms, omdat hulle nie weet wat die toekoms vir hulle inhou nie. Maar hierdie groot verantwoordelikheid word vandag aan ons toevertrou om uit te gaan na Namibië, uit te gaan na elke distrik, streek en gebied van Namibië met een boodskap: Moenie vrees nie, ons bring vir julle goeie tyding, ons bring vir julle tyding van 'n mooi toekoms, van 'n nuwe land Namibië wat gebore word en wanneer u mense vertel, moenie vrees nie, dan moet jou optrede strook met jou woorde.

Ek sou graag wou sien dat ons die gewere wegbêre in Namibië en nou dat dit gereën het en die bokke en skape vet geword het, moet ons onder die bome gaan. Ek dink terug aan daardie dae toe ek nog 'n kind was en my oupa se bokke moes oppas in 70an//ob-rivier. Toe het ons nog gesing en gespeel. Broers, ons in Namibië het opgehou om te speel, ons het opgehou om te sing, ons het opgehou om te lewe. Kom ons doen dit nou, kom ons gaan uit, kom ons voed die mense op sodat ons op daardie manier die vrese vir die toekoms kan besweer.

Daarom wil ek net hierdie paar woorde oor hierdie inisiatief, hierdie grondwet, sê: Behalwe vir 'n paar woordjies hier en daar, het ons vir die eerste keer in Namibië 'n grondwet. Jare lank was ons regeer sonder 'n grondwet, maar daar is net een ding wat my verbly, elkeen van ons wat in hierdie Huis sit sal onderhewig wees aan hierdie wet en dit is wat my vrese ten opsigte van hierdie grondwet besweer.

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MR HARASEB

Daarom ondersteun ek die dokument in beginsel. Dankie.

BUSINESS SUSPENDED AT 13h40 and RESUMED AT 14h00

PREAMBLE AGREED TO.

ARTICLE 1 PUT.

MR KATJIUONGUA: Mr Chairman, irrespective of what was said by my colleague, Mr Kozonguizi, about a multi-party democracy, in accordance with the 1982 Principles I would suggest that article 1(1) reads as follows:

"The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State, founded upon the principles of a multi-party democracy, the rule of law and justice for all."

I think the word, "multi-party", is all over the constitution implied, but I want it to be very clear here as it stands in the 1982 Principles. So I add the word "multi-party democracy."

MR ANGULA: Honourable Chairman, as much as we would like to emphasise the exercise of democracy by our people, I think it would be unfortunate for us to qualify it. You don't only exercise democracy in a party structure or through political parties. For instance the classroom situation. If you want to consult the students on certain things, they don't need to form themselves into political parties in order to be consulted upon. Or in terms of local governments or community initiatives, you want democratic participation of the people, but you don't want them to form parties before they participate in the democratic process. So, I think it would be unfortunate if we start to qualify the word "democracy" in this way.

MR MUDGE: Mr Chairman, I think the idea is to identify problems and then, instead of having long discussions, should there be misunderstandings, to refer it back to the committee to reconsider these points. I would not want to

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see this Assembly now going into a long discussion about the definition and interpretation of the word democracy. I think if there is any doubt, then we can always look at it again in the committee.

Mr Chairman, I did not participate in the debate on the Preamble and I will not make speeches now. I think we should be to the point as far as possible. I can only say - and I want to make it clear right at the outset - that being a member of the standing committee, the Draft Constitution is my draft. I was a co-author of that draft and my role in this Assembly will be to defend that draft. I am not going to criticise the draft, but I think there might be minor points, mainly as far as formulation, the legal settlement and editing are concerned. There are very minor issues that we want to raise, just point it out. Therefore, in this particular case I want to ask that after having gone through the whole document, we might find that the proposal by the honourable member is necessary. On the other hand, we might find in a later paragraph that the principle is accepted and it might not be necessary. So, I would suggest that we just take note of this proposal and put it on the agenda for the committee.

CHAIRMAN: That is not my understanding, I am not going back to the committee. We have been in the committee for how many days, and we failed to agree there and that is why we came here. Many of you wanted to draft the constitution here. That is why we are here now, to draft it. I am not referring anything to the committee.

There is a proposal to add "multi-party democracy" and there is opposition, and I will be putting things to the vote on those specific points in order to move on.

MR HAMUTENYA: Thank you, Mr Chairman. I rose to support the position put forth by honourable member Mr Angula. In the course of our deliberations in the Standing Committee we agreed that many of the key concepts embodied in this Constitution suggest democracy, suggest justice and should not be qualified.

I remember distinctly that I was trying to qualify the concept, "justice", describing it as political, economic, social justice, and it was honourable Katjiuongua and others who said that it was not a good idea to qualify such key principles and we avoided doing so. I would like

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MR HAMUTENYA

to stick to that rule of the game that we have agreed to earlier on, that we do not qualify these key principles. And as honourable member Angula has said, there are so many ways in which the word "democracy" should find its expression in our society, not just in a multi-party political form.

I am therefore proposing that we leave the formulation as it is now, because it is adequate and needs no further qualification. Thank you.

MR BARNES: Mr Chairman, I was not going to avail myself to speak, but like my honourable colleague, Mr Mudge, I was going to try to defend the Constitution as it was drafted by the committee, but listening to the honourable Chairman's remark that "I am not going to refer this document to a committee", it does leave some doubt as to your previous ruling of "I am in the hands of the House."

Mr Chairman, on this particular Article 1 I support the honourable member Mr Katjiuongua. I am not of the opinion that democracy is being defined, but the system of government within the context of democracy, Sir.

May I further draw your attention, with due respect, that in the event of this House not reaching consensus on a proposal, we will be back to square one. Therefore I humbly submit that you will favourably consider yourself to be led by the House with the proposal that these matters might be solved easier if the point is made and note is taken of the amendment or alteration or improvement and refer that to the committee where we could perhaps succeed in the spirit of give and take to find acceptable solutions.

CHAIRMAN: The Chairman has been in the hands of the House and there is only a limit to the Chairman being in the hands of the House. I have been in the hands of the House in the committee for so many hours. We said we would discuss everything in the committee to avoid public debate, and when we have failed in the committee to agree, we would agree to it on the floor. A very common expression used in the committee was that we were going to take it to the gallery. We have come to the gallery, and if we are going to reopen the debate, I am ready to sit and reopen the debate, but I am not going back to the committee,

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unless you rule me out. If I see filibustering going on without end, then the Chairman has the right to rule, and I am doing that, because we went through this whole thing four times, including the Preamble. That has been discussed now for two hours.

So, there is a proposal. There are two statements in favour and two against, that we retain it as it is or amend it.

MR MUDGE: Mr Chairman, the reason why I suggested that we refer this to the Committee is the following: On page 15 of the Constitution, under Article 17, provision is made that:

"All citizens shall have the right to form or join political parties and subject to such qualifications prescribed by law as would be acceptable."

In this article under the Bill of Fundamental Rights provision is made for a multi-party democracy. If you read the 1982 Principles, you will find there that provision is made for the following:

"Namibia will be a unitary, sovereign and democratic State."

Those are the words we used. For that reason I was of the opinion that if we take this back to the Committee we could easily solve it. I can't see any problem. But Mr Chairman, if you force us now to enter into a debate here, then I am prepared to participate in such a debate, but I don't think it is going to get us anywhere. Therefore my proposal stands and I hope that we will not vote according to party-lines and that this matter be referred to the Committee.

CHAIRMAN: I just want to state my position. It will be good if we also honour our statements we made throughout. We agreed to debate everything in the committee to avoid coming to the House where it will be impossible to draft a constitution. We kept on saying we cannot draft a constitution in a big House, hence the committee was set up. The committee has worked and we brought this paper back to the House. I don't see what purpose will be served by going to the committee if we failed to agree there.

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DR TJIRIANGE: Mr Chairman, I would like to, through you, assure Mr Katjiuongua that the problem that is facing us is well-covered in this document. For example, if you look at Article 21(e), it is about freedom of association including the freedom to form and join associations, including unions and political parties.

If you go to Article 24(e), that right is one of the rights from which you cannot derogate. So, therefore the joining of political parties is assured in this Constitution as a right from which you cannot derogate. It is not permitted to derogate from this right. So, therefore, the joining of political parties is entrenched in this document, and there is no need to add that word.

CHAIRMAN: I take it that it stands as it is.

MR KATJIUONGUA: I am opposed.

MR KAURA: Mr Chairman, Article 1(4). In this statement reference is only made to the southern border, the middle of the Orange River. Maybe we took it for granted that we do not have hostile neighbours to our north. We have rivers there, we have the Kavango, we have the Kunene and we have the Zambezi, and I was wondering whether they couldn't be added there, that also the border in the north would be the middle of those respective rivers and perhaps also define our eastern and western borders.

MR HAMUTENYA: Mr Chairman, the reason behind the inclusion of the Orange River as the boundary has to do with the present position of South Africa, which says that the border between South Africa and Namibia is on the northern shore of that river and not in the middle of the river. We are not aware of any such dispute with regard to the Kunene River, the Zambezi and the Kavango River. So, we do not want to split hairs, raise problems where there are none. We are therefore talking about a particular problem that exists, the claim by South Africa. That is the reason. Thank you.

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MR KATJIUONGUA: Mr Chairman, mine is not about the rivers and the borders, I am trying to achieve a perfect Constitution for Namibia.

Article 1(5), page 3:

"Windhoek shall be the seat of the central government."

I want central government to be with capital C and capital G. Thank you.

MR MATJILA: Mr Chairman, I think I accept this proposal. To me it is a bit dangerous to say that if you don't have anybody disputing a boundary, that you don't necessarily have to define it. I agree with the honourable member Kaura that the question of the rivers to the north should also be included, as well as the eastern and western boundaries. Thank you.

MR KAURA: Mr Chairman, I want a clear definition of the borders of Namibia so that the children of Namibia 200 years from now, when they are going to look at the Constitution, will know exactly what were the borders defined by the founding fathers of the Republic of Namibia, and if there is no hostility today between us and Angola and Botswana, I cannot predict that 200 years from now there wouldn't be a dispute, and if it is not clearly defined in our Constitution, how would our children know, the generations to come, exactly what was intended to be the borders of Namibia by the founding fathers?

So, I feel the Constitution must serve as guidance from now on for the next 1 000 years and the borders of Namibia must be clearly defined and that is not offending our neighbours with whom we have no hostility at all.

MR DE WET: Mr Chairman, I would like to ask the Standing Committee whether they have made sure what these boundaries are; because you refer in paragraph 4:

"The national territory of Namibia shall consist of

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MR DE WET

the whole of the territory recognised by the international community through the organs of the United Nations as Namibia.."

Isn't that enough saying that, because we are going to accept the territory recognised by the international community. Why do we include all those other points? That means if we include Walvis Bay we might exclude something else. I am thinking of the northern border, not of the rivers, because to my knowledge the northern border was also shifted south on two occasions. That was done by colonial governments. I don't want to exclude anything if it belongs to this country, and for the sake of the record, I think we all feel very strongly that Walvis Bay must be part of Namibia. We feel very strongly about the water of the Orange River, that we should get our fair share out of that, but we also feel strongly about the northern boundaries.

So, my question is: Can't we omit including "the port of Walvis Bay" and decide that it is enough if we leave "recognised by the international community through the organs of the United Nations as Namibia." That is my question to the committee, and for the sake of the record I just want to say that I am also in favour that Walvis Bay should be part of Namibia and that we get our fair share of water out of the Orange River, but I don't want to exclude anything else.

MRS ITHANA: Thank you, honourable Chairman. I find paragraph 4 of Article 1 defining the territory of Namibia adequately. If a dispute arises, we go to the records of the United Nations when they decided what the territory of Namibia is. If we start defining at this present moment what the territory of Namibia is, apart from those areas which are in dispute, we might be ending up claiming parts of other countries that are not originally ours and cause an unnecessary dispute between us and our neighbours.

MR BARNES: Mr Chairman, the danger of not looking at the defining of the borders, I have just noticed here that it says "including the harbour and port of Walvis Bay." Now, to the best of my recollection, being a product of Walvis Bay for many years before the changes in status, Walvis Bay does not consist only of the harbour and the port, it

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MR BARNES

should be the enclave.

MR MUDGE: Mr Chairman, it seems as if we do not disagree on the principle, it is just a matter of formulation. If there could be a better formulation I would again advise us to ask the draftsmen to look at a better formulation. I think we all agree on the principle. I really cannot see why we should waste time discussing it.

CHAIRMAN: I am also very much convinced why I don't want to go to the committee, because the honourable members who spoke were all in that committee. We went over this paragraph so many times, we have debated it and agreed and brought it here. If we have to go back we will do the same thing and come back again. So, I am convinced we should not go back to the committee. The same arguments are coming up, so it is a question of our beliefs, not a question of language. If we ask the experts to redraft it, we will dispute it based on principles. We are discussing principles here, I think.

MR DE WET: Mr Chairman, I just want to put a request to you and that is, can't we refer it back to some legal advisers, to get legal advice on it before we formulate this in the Constitution. That is the only request I have, to make sure what we do, we do under the empowerment of this Assembly.

CHAIRMAN: Your representative in the committee, Mr Pretorius, suggested the same thing. We had the lawyers there, we asked them, they came back and told us there are no problems.

MR KATJIUONGUA: Mr Chairman, I think instead of researching the records of the UN when a dispute arises, we can ask our draftsmen now to find out what the UN says what the borders of Namibia are and include that in the Constitution.

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DR TJITENDERO: I rise basically to endorse the position and as a member of the Standing Committee, trying to give information and also maybe define what actually our role is as members of the committee. I presumed that those of us on the committee should play a role to inform rather than questioning our own positions. I respect very much the position by honourable Mr de Wet that maybe we should refer it to lawyers, but I can assure the honourable member and the honourable House that in fact this is maybe the third or fourth draft, a draft which is a combination of definitions given in the original submissions made by different parties. Going back to the lawyers does not serve any purpose. I think what ought to be done is that those of us on the committee give explanatory notes. I am surprised, maybe as a result of my own naiveté, that the people who have been charged with this enormous and honourable task of drafting this, are now the people who are asking questions. I would have expected that the House at large would ask questions and we would give explanations, so that the issue can be understood easily on the first reading.

I would like to therefore move that this provision as explained by previous speakers must stand. In an attempt to form a democratic nation out of numerous linguistic and cultural diversities, we have tried the approach of consensus and I think that it worked. It can work if there is a political will behind our positions and behind our decisions so as to pave the way for it. I do think that this definition in terms of the explanations is adequate. I do think also that since we have been using the approach that it is very useful for us to get to know each other and to move forward as we didn't know each other until very recently, that if need be, I think we are being forced by time. We didn't have all the time in this world, and if need be, I do believe, that some of these issues should be brought to the vote. Let's test the other democratic mechanism which has not as yet been tested. I don't think it is the desire of anyone of us to want to vote, but there comes a time when there is a limit, and I think, by the look of things, spending the whole afternoon on page 3, it may be necessary now to move in the direction of voting on some of these issues as speedily as possible. Thank you.

MR BARNES: Mr Chairman, in defence of being a member of the committee, I would like to reply to my honourable comrade member there who was a member in the committee.

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MR BARNES

May I recall certain agreements in the committee which, I think, the House should take cognisance of.

On certain clauses, certain parties have recorded reservations, reservations because they did not agree with that clause. The idea was to afford them the opportunity to make their decision known in public, and therefore, now that the decision is known in public....

MR ANGULA: On a point of order. There was no party which made a reservation on this specific clause, none.

MR BARNES: Mr Chairman, if the member places my integrity in dispute, may I remind him that Mr Pretorius recorded reservations or is there.... No, I am going to avoid being cattish. I promise, I am going to try and maintain the spirit of mutual love.

May I again draw your attention to the fact that we might be outvoted. Come the final decision of the two-thirds we will be back to square one. I sincerely pray and hope that we will do everything to accommodate the ideas and requests, because I don't think anyone in this House wants to make an unreasonable request, and therefore I would like to again support my colleague and honourable member Mr Mudge's proposal that we take note of this and refer it to the committee. I thank you.

CHAIRMAN: The parties entered reservations in the committee on certain paragraphs. Going back to the committee is not going to help, because you have already entered reservations, meaning you are objecting to that. How is the committee going to resolve that, the same people?

PROF KERINA: Thank you, Mr Chairman, and members of the Assembly. The honourable member, Dr Tjitendero, made mention of the tyranny of time. If I can reflect back to the manufacturers of that tyranny of time, it is ourselves. Yesterday the honourable member, Mr Ben-Theo Gurirab, tabled a motion for the independence of Namibia to be on the 21st March. As I remember there was a covenant agreed upon in the committee to bestow that honour on the chairman, because we agreed that the committee should sit, scrutinise and decide and present collectively the proposal of that date to the Chairman to make that announcement.

Mr Chairman, as one of our members has already stated be-

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PROF KERINA

fore, this Constitution is our product and I think the motion that has been presented to this House by the honourable member Mr Mudge should be entertained. We praised you loudly yesterday about your impartiality, your ability, your sensitivity during some of the most difficult times of our discussions in that committee. We want to succeed, we want to be part of this birth, we want to be midwives and nurses and doctors. We want to be technicians behind this birth, and I only want to appeal to you Mr Chairman and to all the members to refrain from threats, to use our common sense, our reasons, our sensitivities and to refer those issues in those articles that are controversial back to the committee. I am sure we shall work very hard not to disappoint you, Mr Chairman. This is just a humble appeal.

MR KATJIUONGUA: Mr Chairman, I must say that I share your view, and with all due respect to my brother, Mr Mudge, Mr Barnes and Prof Kerina, I think we should try to resolve these issues here. I am afraid that the committee might take more time than we think. Let's get to the crux of the problem, for better or for worse. If necessary, vote. I don't mind how many people vote against me, I will state my case.

Number two, I think I am not here to behave - and I suppose all of us - like voting cattle, and I assume as academics - some of us here, including the honourable doctor over there - Karl Popper said in his "The Open Society and its Enemies":

"A scientific proposition, is scientific if, in the light of new evidence, it can be falsified."

Mr Kaura came here with something we did not discuss in the committee, the definition of some of our borders. That is new evidence, a new argument, not from a member of the committee, from a member of the House who was not there. What is wrong in looking into that argument? Under the pretext of wasting time, we must also weigh the risk of time versus blundering, making errors.

So, therefore, I agree with the passage as it stands here, but I have nothing against having a definition of the other borders, and that is why I suggested that our lawyers can have a look at the UN-records how to define the territory of Namibia, including what stands here. I am not saying what stands here should be omitted or changed,

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MR KATJIUONGUA

simply that we should not try to have a cover-up of anything. If we are open and above board it must be both ways. So, I see nothing wrong inherently in trying to define the territory of Namibia by making reference to UN-documents, unless we are trying to hide something. Thank you.

CHAIRMAN: If the lawyers can in the next five minutes come with a draft, we will look at it again, but not in the committee. Is that a reasonable suggestion? Article 1(5).

MR MUDGE: On a point of order. Mr Chairman, I want to appeal to you, we have taken certain decisions in the committee, we have agreed on most of these issues and I think the members of the committee should be prepared to defend what they have decided. But that cannot take away the right of the members of this House who have not been present in the committee to voice their opinions, to discuss and to suggest, make proposals. It can never take away the right of people who have fought an election over months and who cannot just be used as a rubber stamp.

Mr Chairman, still on this point of order, I was hoping that we will differ on something more serious than this one. As far as I could gather we agree that we want Walvis Bay and we want half of the Orange River. So we do not disagree in principle, but there was an opinion voiced by a member here on this side that maybe the formulation might not be correct, and Sir, I think that when you continue, other matters like this might come up. Honourable members here might come with suggestions, members who have not been in the committee and I think we should take note of that and try to put their minds at ease by solving the problem. Please, Mr Chairman, let us not be impatient with the members of the House, they haven't participated in discussions, and if it is your ruling that we should skip this paragraph, then it is your ruling, but let's not continue in this spirit.

CHAIRMAN: No member has been stopped from talking. One member also just exercised his right and said what he said. I have been allowing all the members and I am prepared to sit here until midnight listening to them. But I am saying that going back to the committee, the committee will debate, they will come back again to the House, the House will debate again. That is what I have experienced with honourable members even in the committee. We will be

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agreeing on a point, go back home, come back and change that. That is what happened in the committee.

So, my proposal is that we skip it as proposed by some people earlier and refer it to the lawyers and then it comes back, but not to the committee.

ARTICLE 1(1), (2), (3) and (5) ADOPTED.

ARTICLE 2 PUT AND AGREED TO.

ARTICLE 3 PUT.

MR PRETORIUS: Mr Chairman, I reserved my right to speak on this point. I put my point of view in the committee, but I want to thank the committee for a compromise, because I think as this this clause now reads it is an improvement on the original. But I still believe it does not go far enough and I am glad that other people support me in this view.

For example, Joseph Diescho, in the "Namibian" of 22nd January 1990, wrote the following:

"On the language question, the constitution recognises English as the only official language although it does not prohibit the use of other languages in schools and/or governments. It is unfortunate that the Constitution is not firm enough on the necessary promotion of indigenous Namibian languages. The reading of the article makes it incumbent upon those who do not speak English to petition for the use of their language in their schools and to convince the authorities as to why a language other than English should be used. This exhibits unsensitivity on the part of the élite legislators who have adopted the use of English as their own and as a means to power. All languages should be official, with the proviso that English be the national language and the language spoken by the majority in a particular region should accompany English in schools, business and government."

I think it is a very good proposal and I want to leave it with the Assembly.

This afternoon my colleague, the honourable member Mr Aston, told me what an old wise black Herero man once told him and he put it in his English to me as follows: "A person who ignores and refuses to speak his mother-tongue is a man who as a baby was denied his mother's milk, but

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he was raised by the milk of a special goat, namely a goat without horns, and you can imagine yourselves what kind of a man he has grown up to be."

Mr Chairman, the story is told that one of the better-known members of parliament in South Africa, at the beginning of this century, Langenhoven, once said in parliament that he thinks that half of the members of parliament in South Africa are donkeys. So the speaker ordered him to withdraw his remark, and he withdrew it by saying he believes half of the members are not donkeys.

So, I hope that when future governments decide on this language issue, that at least there will be more than two-thirds of them who are of the members who are not donkeys.

CHAIRMAN: I just want to read the article and I think it is very clear:

- (1) "The official language of Namibia shall be English.
- (2) Nothing contained in this Constitution shall prohibit the use of any other language as a medium of instruction in both private schools as well as schools financed or subsidised by the State, subject to compliance with such requirements as might be imposed by law, to ensure proficiency in the official language, or for pedagogic reasons.
- (3) Nothing contained in sub-paragraph (1) hereof shall preclude legislation by Parliament which permits the use of a language other than English for legislative, administrative and judicial purposes in regions or areas where such other language or languages are spoken by a substantial component of the population in those regions or areas."

It was so clear, we were told it causes problems for nobody. It is even covered in my Damaraland and therefore it stays.

ARTICLE 3 AGREED TO.

ARTICLE 4 PUT

MR MUDGE: Mr Chairman, I want to refer to the proviso in Article 4(b)(cc). I wish anybody could explain to me what is meant by the words: "...persons who were born in

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Namibia and were ordinarily resident in Namibia at the time of their birth." How can a person be ordinarily resident in Namibia at the time of his birth? You see, we also make mistakes, Sir.

CHAIRMAN: The lawyers will look at that paragraph.

MRS ITHANA: Article 4(4) says, "citizenship by registration may be claimed", which I think is a mistake. One cannot claim, one has to apply.

CHAIRMAN: Isn't it legal language?

MR MUDGE: Mr Chairman, I agree with the honourable member that in (5), citizenship by naturalisation cannot be claimed, but I think naturalisation by registration may be claimed. Maybe the honourable member had (5) in mind. In (5) it is correct, but not in (4).

MR KATJIUONGUA: Mr Chairman, Article 4(8)(b): I think this is simply an omission. We agreed in the committee that we will say: "have served or volunteered to serve in the armed or security forces of another country without the written permission of the Namibian Government" and then, "after the coming into force of this Constitution.

MR RUKORO: I think there is no omission, my honourable brother may have misread the sub-article, because the last sentence in sub-article (8), namely "after the commencement of this Constitution", applies to paragraphs (a), (b) and (c).

ARTICLE 4 AGREED TO.

ARTICLE 5 PUT.

MR KATJIUONGUA: Mr Chairman, I think we should stop with "and shall be enforceable by the Courts" - that will be consistent with the 1982 Principles - and the words "in the manner hereinafter prescribed" deleted.

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MRS ITHANA: Mr Chairman, with due respect to the honourable member who suggested the deletion, I don't know what is the objection on the phrase that follows, because it is referring to "hereinafter prescribed in this Constitution." Why should we delete it? The manner is already prescribed, we are coming to it.

MR ANGULA: Mr Chairman, what is being said here is that the various provisions made for fundamental rights and freedoms are contained in all these articles. For example, some of them are derogable, some are non-derogable, and this Constitution prescribes exactly how they should be applied, and I think it is very important. If you just leave it as "enforceable by Court", then you leave it up to the government to make whatever law which can be enforced by Court. This is to emphasise the fact that the Courts can enforce. I think it is very, very important. If you leave it out, you leave it hanging.

MR KATJIUONGUA: Mr Chairman, it is a matter of preference why people want certain things. All I am trying to do is to avoid the impression of limiting the enforceability of fundamental rights. Some of them, as far as I am concerned, should not be limited.

CHAIRMAN: The member, in the usual spirit, is saying he will leave it.

ARTICLE 5 AGREED TO.

ARTICLE 6 PUT.

MR BIWA: Mr Chairman, if my memory serves me well, we have agreed to delete the qualification and to put a full-stop after "liberty".

CHAIRMAN: We did not agree upon that. There was a discussion and people pointed out examples and we left it. It is true, there was a proposal to delete it.

MR KAURA: Does this mean that a person who has committed a crime cannot be deprived of his liberty by being jailed,

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if we say he cannot be deprived of his liberty? If we don't have the "except", it means a person can commit a crime and you may not deprive him of his liberty.

ARTICLE 7 AGREED TO.

ARTICLE 8 PUT AND AGREED TO.

ARTICLE 9 PUT.

MR KAURA: I was just wondering, Mr Chairman, under Article 9(2), if a person serving a sentence in jail can be forced to perform certain tasks.

CHAIRMAN: It is covered somewhere.

ARTICLE 9 AGREED TO.

ARTICLE 10 PUT AND AGREED TO.

ARTICLE 11 PUT.

MR KATJIUONGUA: Mr Chairman, as I said yesterday and many times in the committee, I have problems with this whole thing. My preference is that we scrap this article, but should the majority decide otherwise, I have another proposal.

MR RUKORO: Sub-article (4) as well as what follows in sub-article (5), (6) and (7), embodies the regime of what is popularly known as detention without trial, or preventative detention as we call it here, and I was going to join the honourable Mr Katjiuongua in saying that this part of our Draft Constitution really represents a black spot in an otherwise impeccable document. Our type of Namibia does not deserve these provisions as part of our basic law and I would urge my fellow-members here that we simply rid our nation of these measures in the full knowledge that if and when indeed an emergency situation should arise in future, we can rely on other provisions of this Draft Constitution, specifically Articles 24 and 26, which deals with derogation and emergencies, to cope with any legitimate, clear and present danger to the security of the state.

Although the derogation and emergency provisions also provide for prolonged periods of detention, they are

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nevertheless directly subject to the scrutiny and supervision of parliament by way of a two-thirds approval requirement, and that is in addition to the periodic review prescribed for the advisory board, appointed on the advice of the Judicial Service Commission. I think that is a far better and respectable detention regime, consistent with the human rights nature of our document, and that we should really stay clear at this point in time from any provisions dealing with detention without trial as that practice is a very sore point in Namibian society and consistent with our declared policy of national reconciliation and forgiveness, we cannot meaningfully encourage people to forget the past, while at the same time we are entrenching as part of our basic law the kind of provisions that gave rise to untold suffering and misery in our country.

So, I would really urge my fellow-colleagues and honourable members that we simply delete sub-article (4) to (7) of the Draft. I thank you.

MR BIWA: Mr Chairman, honourable members, as we indicated yesterday, we are very unhappy about this part of the article, and without repeating what was said by honourable member Rukoro, I would like to associate myself with his sentiments and his proposal that Article 11, starting from (4), be deleted.

Mr Chairman, I intended to explain the reasons underlying our objection to this part of the article, but since I would like to be guided by your ruling that there will be no long debates on these articles, I will confine myself to associating myself with the sentiments expressed and propose that these sub-articles be deleted.

MR KOZONGUIZI: Mr Chairman, I would like to differ from those who say those paragraphs of Article 11 should be scrapped. Mr Chairman, I think it is very difficult that we have to discuss the Constitution after the election of a government. It would have been better if we could have discussed the Constitution before that. The reason is, we have to remember that there was a time when this country had to go through colonial experiences. There was a time when there was a struggle for independence, and of course, when preventive detention, and other such practices, could

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be opposed, because that was part of the machinery of enslaving the people of this country.

But we have to remember that the government we are going to have is a government elected by the people of this country and as such we have to protect that government in one way or the another, especially where we have abolished the death sentence. I think our machinery for justice and preventing anyone from doing harm to the authority of the country should be strengthened, and that is why I feel we cannot just depend on Emergency declaration every time a few people run amuck. There should be some powers that those who are responsible for maintenance of law and order could exercise it.

Mr Chairman, as far as I am concerned, I am for the provisions for detention as they are here. Of course, I don't object to people changing maybe the 30 days and so on, but I feel that from the point of view of justice to the state they should be there.

MR ANGULA: Honourable Chairman, first of all I would like to agree with those who are saying that this section of our Constitution is, for lack of a better word, a black spot in the document. That is very true.

I think what it is, is actually a reflection of our human condition, especially in this part of the world. In our region here we have certain regimes which use destabilisation as the instrument of foreign policy, and we have seen the effect of that in a number of countries in our region. I tend to wonder as to what will happen if some of these regimes take that as an option against this country. Will we be able to defend this Constitution without that clause if we don't have the means and the instruments of defending it? Will it be possible to defend our own people, their lives and their property if we don't have this section in our Constitution?

I thought very carefully about this, we had a long debate on it, and I tend to think that this is a necessary evil you cannot do without if you want the means and ways of defending the very Constitution you are writing and the rights of our people. I believe that this section can only be applied under the conditions of Article 26. If you take it out, Article 26 will of course allow you to declare a state of emergency, but over and beyond that we will not be able to do anything. Unless I hear some other

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legal arguments, especially from my good friend with the legal mind, but personally I am not very strong about this article. The only problem I have is that our region is unstable and it has a lot of neighbours who may be a threat to this country, and even right now some of our borders are not stable at all. How can you defend the lives of people there? I wouldn't like to have a beautiful Constitution which will not be able to defend and protect them. But if you want to remove it, you can remove it, but you must see the consequences.

DR TJITENDERO: Mr Chairman, I would like to associate myself with the previous speakers, and particularly honourable Kozonguizi. I think he stated it very clearly. My sentiments, however, goes with the position that honourable Mr Rukoro has expressed, because of our experience in the recent past, because of circumstances and experiences we had, nobody can deny and I think it is an inescapable condition for all of us, having suffered under the draconian laws that are known as detention without trial, but I think the difficult position for us is to try to create structures today that will serve the future needs and our projections into the future are very, very limited.

I think, going along with the position that honourable Kozonguizi has stated, that we are creating a new Namibia and a new situation and a new government. We have elected a government of the people, accountable to the people. Obviously, those of us who are idealists, believe there are shortcomings in human nature, and I am imagining a situation where unruly elements will get up and threaten the very law and order that we are trying to create here, how do we defend ourselves, and the Constitution? Shall we rely on the state of emergency, I would not like to live in an independent Republic of Namibia which will be characterised by states of emergency one after the other.

Therefore, the only recourse if about 500 men and women take up arms and threaten the security of the population, we must have a provision in this Constitution which must protect our people. If we arrest all those 500 people, what shall be done with them? Any action the President may take may not be constitutional. If there are 500 or 5 000 armed persons, I think that it will not be possible to stop such a group without an empowering provision in this Constitution to allow the President to act swiftly. I think this is a necessary evil and that we have to live

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with it. We must transcend our present and past experiences to appreciate what we are trying to create. I think the important aspect to keep in mind is that we are legislating for the people and against the people. Because, both the defenders and violators are people. Thank you.

MR M GAROEB: Thank you, Mr Chairman. For a moment earlier in the day I thought that we were playing for the gallery, but it would appear as if the House is on a serious course to have this document finally adopted.

Having said that, Mr Chairman, I would just like to associate myself with the previous speakers on this particular and sensitive question of arrest and detention.

Probably one of the most beautiful things we have done, and I think we are second to none in the whole of Africa, is the fact that we have abolished the death sentence, and that is the maximum deterrent. INTERJECTION. Yes, in the world. Honourable Gurirab, who is our foreign affairs expert, reminds me that this is a record second to none since we have abolished the death sentence and that was the maximum deterrent for the protection of the state, for the protection of the people of this country.

The minimum is what we are offering here in this Constitution, arrest and detention. You can change the dates, the months, the weeks, whatever the case may be, but in the absence of any kind of deterrent, the death sentence is gone, but in the absence of this kind of deterrent that is generally feared, what guarantee does the future state have that it can protect itself and the people of this country?

Mr Chairman, I do not want to pause very long on this issue, but to reinforce the position that it is a necessary evil - people have mentioned black spots, white spots, I will mention brown spots - that we as an infant nation should have it and for this particular reason I just stand here to support the comrades who have spoken on this particular issue. Thank you.

MR KATJIUONGUA: Mr Chairman, I think outside destabilisation is not the only factor that we will have to take into account when dealing with these matters. I think it

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is a fact of life that all of us who are in this building, 72 as we are, have aspects of our past that we would like to be corrected by this Constitution as a way of cleaning up the past records, and we are now charting a new course, a new future. So therefore I think it is important that we take out, instead of scrapping the entire article as I proposed, sub-articles (5), (6) and (7). I think we should try to avoid unnecessary evils by using other methods. As Mr Rukoro pointed out here, Articles 24 and 25 can do the job. Thank you.

MR RUKORO: Mr Chairman, I am simply rising to respond to some of the comments made on my submission. Firstly, to associate myself with those who are saying they would not like to live in a Namibia which is under perpetual states of emergency, and that if you needed to arrest a couple of people, ten, fifty or five hundred, you necessarily have to declare a state of emergency in order to do so. I do not agree with that, and my comments were not directed towards that end.

The point is, if we have a couple of trouble-makers, destabilisers, I am of the opinion that the current - or whatever system of justice we are going to have - for instance the Criminal Procedure Act, would allow sufficient scope for government to act, to take these people, arrest them. For instance, if you read here, "nothing contained in sub-article (3) hereof shall apply to people under preventative detention." Sub (3) says that all persons arrested in this country must be brought before a magistrate within 48 hours, who can, based on the prevailing Criminal Procedure Act, remand them into custody, pending further police investigation.

So, I don't see why, if we have some trouble-makers, they cannot be dealt with within the existing criminal procedure system, and really, if we reach a situation where the existing criminal procedure provisions simply prove to be inadequate, I do not see why parliament cannot come together and pass these types of measures that we want to pass today.

But my point is, consistent with our approach when we abolished the death penalty, when we said "let's give human rights a chance, let us prove ourselves wrong," if necessary we can bring back that penalty. If we can do that, I don't see why, if the need should arise, we cannot come back as parliament and legislate on the basis of the

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current provisions of the regime dealing with detention without trial. But I think we should start on the right footing, we should start on the basis that we want to give human rights a chance and simply delete subarticles (4) to (7), and if the need should arise we can deal with that situation at that point in time.

DR TJITENDERO: Honourable Chairman, as I have said, I am not an advocate for arrest and detention. I think honourable Rukoro's submissions of deleting sub-articles (4) to (7) is acceptable to me as long as we retain the following Articles (1), (2) and (3) to deal with the situation as it arises. Therefore I will go along with the amendment.

MR ANGULA: I want to understand what we are doing. Sometimes we do things because we want some people to say yes for something, without thinking about the situation in which you are. We are writing this Constitution for this country, a small country as it is, and if you happen to arrest more than 100 people at a time, armed to the teeth or something like that, how are you going to bring them all within 48 hours to court? Will we be able to do that? These provisions are put here for practical reasons, that there are certain things you are not able to do with the number of judges we have. If you arrest the people we will not be able to bring them to court within 48 hours, besides trying to play to the sentiments of some people somewhere, because we want to be seen to be human rights advocates. We are dealing with the real situation, a particular geopolitical situation, not because we want people to be arrested. I don't want it. But will we be able to defend this Constitution?

CHAIRMAN: I propose that we skip Article 11(4) to (7) and then you reflect on it. Leaders of the parties can discuss it.

MR KATJIUONGUA: Mr Chairman, we are not here to waste time. On the other articles you said we must go and people said we must vote. I am not saying we must vote, but I think we must finish this thing now and continue, so that we know what we left behind is of no importance. But I want us to act on this thing now as we did in the other cases.

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MRS ITHANA: Mr Chairman, women are known to be lovers of life and respect life as such, more than gentlemen. I am sorry to say that. When it comes to this question of detention without trial, I don't want people to think that what I am going to say will make me less of a woman.

Mr Chairman, honourable members, let's try to come down to Namibia, our country. We are privileged to write a Constitution for ourselves and for our children to be able to live in peace and to be able to protect and uphold this Constitution. We can only do so if we have the machinery to do so.

I have seen for example here, there are documents from all corners of the world, of people telling us "scrap this, scrap that." When they were writing their own constitutions we were not there. We are here to write our own Constitution for ourselves and our children and therefore I do not want us to talk as if we are foreigners. We are here, we have grown up here and we know our situation, and therefore we must be realistic.

Other speakers have pointed out that we have abolished the death sentence. In this country we have people who are running up and down with arms and arms are hidden everywhere. Some discoveries were made recently. These people are not going to disappear the day we adopt this Constitution. Maybe, maybe not, they will be here. Trouble can break out here any moment. How are we going to deal with it?

I heard what honourable Kozonguizi has just said. It could have been better if we had written this Constitution before we were elected, because now when we are talking we are saying because I am not there, therefore I want to secure this. We are writing this Constitution for ourselves and for our children and for the future. Therefore, let's be serious, consider this on a serious note. It is an evil - I support what honourable Angula has said - it is an evil that is imposed on us because of the nature the of human being. If we don't have the death penalty, what else can deter those who are there trying to do this and that?

Let's get back to Namibia, let's talk of our Constitution, not the Constitution of America. Thank you.

MR RUPPEL: Thank you, Mr Chairman. I don't rise lightly

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on this matter. I was myself detained without trial and I have had some first-hand experience.

But we are here today to write a constitution which we hope will last for many generations. We are not here to write only a human rights charter or to please the world around us with writing nice things which will not be workable. We have to be, as previous speakers said, realistic, also if it hurts sometimes. We have to look to the future, we have to provide for all sorts of contingencies, we have to provide for the possibility that the very framework of the society within which we hope that the individuals and this country will enjoy their human rights and will be able to exercise their individual rights fully, that the very framework of a society may be attacked at times, and then the government which will be in power at the time, the executive, should not be placed under such a stress that it cannot resolve the issue it has to resolve in a crisis, without being forced to throw out this very constitution which we are framing today.

So, we have to look at even this very crucial issue realistically and try and see whether there is not some other provision in this Constitution - and I have not been convinced yet that there is another provision - to deal with the specific problem for which this clause has been put on the draft, namely to provide against what is reasonably apprehended to constitute a clear and present danger to the security of the State. It is an empowering clause which will enable parliament, after a careful debate, from time to time to provide within the parameters laid down here, which are fairly strict, laws to be able to cope with emergencies, so-called emergency legislations.

The problem is, in my view, not to completely ignore the important issue at stake and the machinery which we have tried to provide for government to enable it to deal with this sort of situation, but to rather concentrate on preventing an abuse of power by the executive once it has this sort of provision at its command. I think there we have to look at the Constitution and in my view there is ample provision made for the protection of the individual who finds himself at the receiving end of this kind of provision.

There is provision made for review boards which are staffed by judges or persons who would qualify as judges, very responsible members of our society, who would not lightly prolong any detention. There are also other provisions which make some of the other basic rights non-derogable even in those circumstances. It is quite a

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departure from the laws as we had known them here before.

As far as I can remember from reading literature on the subject, other democratic countries also avail themselves from time to time of emergency legislation. It is a protective mechanism, it is necessary to protect a society in which human rights are exercised. Thank you.

MR MUDGE: Mr Chairman, I listened very carefully to all the arguments. I found myself in a very awkward position, seeing that I was member of a committee who had unanimously recommended this article in its present form.

I did a lot of soul-searching while listening to the honourable members, and I tried to be as objective as possible, and the one question I asked myself was if I would have been sitting over there as a member of the majority party, whether I would have objected to this article or not.

Sir, I was a member of a government who made use of this method, detention without trial, to protect the State against what I thought was a danger to the State. I did that and I haven't so far apologised for that. Whatever the position might be today, when I was in government, Swapo, as far as I am concerned, threatened the security of the State, the State as I saw it and for that reason we made use of this particular method of protecting the security of the State. I hope that honourable members on the other side who have always criticised this method will now have a little more understanding for the necessity of such a measure. This is the way we all learn. As the wheel turns, we find that we also change our attitude towards certain methods.

But Sir, I want to make it very clear, I don't want to include provisions in this Constitution to protect a Swapo-government, I want to include measures in this Constitution to protect the State and the Constitution which I have adopted and my party has supported. That is what I have in mind. For that reason I cannot go against the principle of protecting the security of the State, as much as I respect the fears and the reservations that many people might have.

But it also became clear to me that we might have to have another look at this article, because we cannot be insensitive to those fears. We may not completely ignore the

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reservations expressed here, and therefore I very much welcome your suggestion that we should have another look at the article. In any case, I would have had some observations to make when we come to paragraph (5) and (6), and I can remember that both the honourable member Mr Garoëb and Mr Katjiuongua indicated that they also want to speak on those paragraphs.

All I can say at this stage is that I want to protect the State because it is mine, it is my country, and anybody wanting to threaten the security of my country, and it was always my position that it should be protected. So, what I said yesterday must also be true today, I cannot change my views on things like this so rapidly.

Mr Chairman, I don't want to say more at this particular point in time, but I think that we might have to have another look at the article and I will thus support your suggestion.

MR KAURA: Mr Chairman, I have read this article over and over

MR BOTHA: On a point of order. Mr Chairman, you made a suggestion, and if I heard honourable Mr Mudge correctly he supported your suggestion that we look at this again, and I would also like to support that suggestion that, seeing that we have heard very many important feelings expressed about this very sensitive part of the Constitution, that we go back to our caucusses tomorrow morning, and that we come back, after we have rethought the whole issue of preventative detention. So, I would suggest that we don't continue the debate now, but that we actually go back to our caucusses and try to take into consideration everything that has been said here.

MR KAURA: Mr Chairman, to refer it back to the various caucusses is all right, but a person is only a product of his own experiences, and the duty of any person is to protect humanity against humanity, because the long history of mankind is always the destruction of one human being by another and this is why we have this type of constitution, to protect us against ourselves. It seems as if we are forgetting very quickly that we have lived under 180 days detention and whatever the case may be, 90 days detention without trial, and I am surprised that in the interest of the protection of the State we seem to be advocating the possibility of implementing 90 days, 180 days detention

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without trial in our own country. When we say these clauses should be deleted from our Constitution, I am surprised that human memory is so short, and if it is going to be referred back to the caucusses, let it be, but we are forgetting very quickly.

MR RUKORO: Mr Chairman, firstly I want to make two points. The first one is that I want to appeal to the members to really debate this question in a very cool and restrained fashion. We should refrain from making emotional statements, they would serve no purpose. If we are going to start to abuse each other by statements like when some of us argue for a certain position, we are trying to play to the gallery or impress on extra-parliamentary or assembly audiences, I think that is a serious allegation which is devoid of all validity. We are here to express our own views without fear or favour on a very important constitutional aspect, and I think our contributions should be viewed in that light, and not that somehow we are the victims of foreign advisers or interferers whose interests we are trying to serve in this House. We are simply trying to serve the interests of the Namibian people. That is what we are elected to do, that is what we have to do and only the force of argument should convince us otherwise.

Mr Chairman, I thought we were on the verge of a historic compromise, that is why I was not in favour of your idea that we should refer this matter to some other process outside the Assembly. I thought that we are simply labouring under some kind of misunderstanding, the misunderstanding being that some people think those of us who are arguing for the deletion of these measures are not serious about State security. It is just the exact opposite. We are very serious about State security and I think they are also arguing that the only way to have a constitutional basis for preventative detention is actually when you have a provision to that effect in the Constitution in the form embodied in sub-articles (4) to (7). I think there they are wrong, the constitutional basis is there, Article 7, which deals with protection of liberty. The proviso to that article which says "except according to procedures established by law", that is where my argument comes in, namely that if and when in our independent Namibia the situation should arise where the state security is being threatened, where we need measures authorising detention without trial, it is within the competence of parliament at that point in time, against the background of a

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proven necessity, to legislate methods of this nature. They do not have to be in our Constitution in order to have a legal foundation, they can simply be encompassed in ordinary laws of the legislature. The authority is here, "except according to procedures as established by law."

That is why we are saying whether you are for state security or against it, if and when the need should arise, there is nothing that will prevent the future Namibian parliament within days to respond to that situation. But the argument that we have a one and only chance to serve that interest and it is only by including that in a constitution, that is false.

MR HISHONGWA: Thank you Mr Chairman, we are not really taking the situation as it may appear on that particular day. If we take the situation as it may appear on that particular day, we may not find ourselves having enough time to arrest the situation. Comrade Angula has said here that we are in a very hostile region and anything can happen. Suppose something happens, maybe an invasion of this country and you have to arrest a lot of those people or they come somewhere out of the outskirts of Windhoek where the parliament cannot be able to meet, as honourable Rukoro is saying that parliament will answer, what will happen if then the government does not have authority to act? What you are trying to do here is to actually have this very important document to be toothless, toothless in the area of security of this country and our people. Therefore we should think very seriously as to what we are to do here.

I would like also to say that it seems to me, and we have talked about this issue, it is only a few people who are actually thinking that we must change here or there. The majority of the people seems to be agreeing. If then sometimes we don't come to an agreement, then the machinery must be found to come to an agreement, or maybe we should vote on some of the issues.

I believe also that all political parties in this honourable House delegated trusted people to go and discuss in the committee, and then at the same time they had the time to consult with their parties, but yet what I see here is that people are trying to recover or renegotiate what they have possibly lost as a concession during the committee, because it is mainly the members of the committee who are trying to bring this out again. When are we going to

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finish.

I am not saying we should not try to address some issues, omissions, and so on, but let us try actually to address the issues as they appear.

Honourable Rukoro, I would like to say that the moment you are talking about, possibly this parliament would not be able to meet for security reasons, and therefore, let us give the government the means to protect us and to protect the country. I agree with those who say that if this Constitution was drafted before the elections, the members would unanimously have adopted it. Thank you.

MR RUPPEL: I will be short this time, I just want to address myself to the argument by the honourable Mr Rukoro. I do not believe that parliament is empowered to provide by legislation for emergency situations on the basis of these few words "except according to procedures established by law" in Article 7. I say this because of the provision in Article 11(3), where it is specifically stipulated that:

"All persons who are arrested and detained in custody shall be brought before the nearest magistrate or other officer authorised to exercise judicial power within a period of forty-eight hours of their arrest."

You cannot go beyond that, the legislature is bound by that, and the whole idea of preventative detention is to extend that period of 48 hours to something more practical in certain emergency situations. That is the difference. So, the answer does not lie in Article 7.

MR ANGULA: I would just like to come back to the proposal made by honourable Mr Mudge, that Mr Mudge and honourable Mr Katjiuongua wanted to say something about subparagraphs (5), (6) and (7). Can we hear that, then we can decide what to do, rather than going in circles and redebating the whole issue.

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MR KAURA: Mr Chairman, I am getting confused, and all I can say at this juncture is that when the conditions in a nation reaches that point where you have to arrest people and detain them without trial, the State has failed, and whatever measures you institute at that particular point, whatever measures you institute, will not stop the people to attain their aspirations if they regard your actions and the actions of State as unfair. Then I think we have had a very recent experience and especially for those of you who are sitting on the other side who have gone through this detention without trial. Did it stop the aspirations of the people to attain what they wanted to?

So, when the people start to resort to violence, then there is something wrong with the State, and until that wrong is redressed, the people will continue until final victory and until their goal is attained. So, my feeling is this: This chapter should be kept as it is to protect our people and the State is protected. The people will only rise up in arms against the State when there is something wrong with the State. Are we anticipating that there will be something wrong with the State and consequently the State will have to implement detention without trial, and therefore we must find measures to make it possible for the State to do that? That won't help.

MR MUDGE: Mr Chairman, I want to repeat my proposal that we look at this paragraph again. I think what we are doing now is that we are arguing in circles, we are just not getting anywhere. It is sensitive and I think we should have a look at it again.

MR TSHIRUMBU: Mr Chairman, I am one that can talk about detention without a trial, because I spent two years in jail waiting for trial. It is very hard and it is very bad indeed. But that was different to this that we are talking about now. To scrap this chapter in this Constitution we have at present, is to invite lawlessness. I have been in conversation with a few people who were so happy to hear that the death sentence is being scrapped, is no longer on the lawbook of Namibia. Some of them said to me: "That is good, these Koevoet-elements who have been killing our people, raping our women, we are going to kill them, because I am only going to get a 12 years sentence and I come back home."

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MR TSHIRUMBU

If we talk about scrapping this chapter, then we must know what we are talking about. It is very, very important that the State prevents lawlessness. If you have arrested ten tsotsies and one of them tell you, "we were twenty", the others just ran into the mountain, like at Okahandja when one policeman was killed, would you take these ten to court and leave the other ten to come next month to do the same crime?

We must be very careful not to try to make this coming government a nice boy, we must never do that. If we want to be a strong government we must know that Namibia is we. We don't have any intention of locking up somebody and keeping him in jail like the other government did to us. That is not our intention and that is not why we are here.

If this law is no good, then it will die by itself. To scrap it is just to show that the committee we have appointed is too useless and stupid, because they don't know what they have done by making such a law and I don't think it is good that we show the world we have a stupid committee, otherwise we will all become stupid.

Let's save this chapter and if anything goes wrong, the government can use this law and then we are not all going to die today or tomorrow. Then we have to come to the parliament and say "what are you doing, it is the same chapter on which we argued and now you are starting to misuse it."

Therefore Comrade Chairman, I speak to you as a father speaks to his children, I would like you all to understand this chapter. I thank you and I hope this is the end of the exchange.

DR TJIRIANGE: Mr Chairman, I am simply taking the floor to support the idea of honourable Dirk Mudge that we may really leave this issue and discuss it later.

I think that in general there is nobody in this House who does not agree with the necessity of protecting the Namibian people and the State. Everybody seems to be agreeing that there is a necessity. On what we are not together is the method. How do we actually go about achieving that without having a draconian clause in the Constitution? So everybody seems to be agreeing that there is a need for these kinds of measures, but what form are they going to take? This is where we have not found a common under-

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standing. Maybe if we sleep on it, we may look at the constitutions of West Germany, etc., and we may find some kind of common ground which will protect the State, a formula which will allow the government of the day to protect us and the State in general without raising serious doubts about the democratic nature of the Constitution.

So, I think we can sleep on it and I will be very happy if homework can be done and a solution be found. Let's do some reading tonight and find a formulation that will be accepted by all of us, since all of us accept the need for this.

CHAIRMAN: We will sleep over this one, the leaders are going to meet and provide solutions, as they are supposed to do.

ARTICLE 12 PUT.

MR MATJILA: Mr Chairman, before I come with my proposal under sub-article 12(1)(b), allow me to comment on a statement that was made earlier in this House by one honourable member - I think it was honourable member Ithana - that documents are being smuggled into this House - if I understood her well, I speak under correction - that documents are being smuggled into this House which apparently urge members to propose changes or amendments to the Constitution. I don't know if I understood her well. If that is the case, Mr Chairman, I would like to say that I think that statement is a bit misleading and perhaps puts the dignity of the members of the House in disrepute.

I found some documents here when I came into this House this afternoon, and I have gleaned through all of them and I found that they come from organisations, individuals and so on, and they contain various proposals and amendments, suggestions and so on, which they think the members of this House could put to good use if need be.

Now, Sir, I am a man who strongly believes in getting ideas from other people, I am a man who strongly believes in advice. The "batsotsos" have a way of describing a man who is just the opposite of what I am saying, they say "hy is toe" and they use this sign, meaning that you have become so impregnable that you would not accept anybody else's advice.

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MR MATJILA

I think in this House, and for the immense task we have set ourselves upon to do, we shall always - and I want to emphasise - we shall always accept suggestions from outside. But of course, being all honourable men and women in this House, all honourable members, I think we are all grown-ups and we are capable of looking through all the material that we get in order to see to what extent we can use it. Even the Great Book warns: "Go to the ant, thou sluggard, and learn from his ways." That means, never ever think that you can be able to provide all the answers, you can always get advice.

On this particular subclause I want to propose that subclause (c) does not augur well with the heading "Fair Trial", when you read it. It says:

"Judgments in criminal cases shall be given in public, except where the interests..."

"Except". That means that somewhere there will be fair trial and somewhere there will be the opposite. Where the interests of the State are at stake, it seems to suggest that when the State wishes, then no fair trial will be held. It also suggests fair trial is when you have it in public, obviously when everybody is able to state their case and the public is able to listen or to participate in the form of witnessing. Thus, the words, "except where the interests of State security, juvenile persons, or morals, otherwise require" seem to be unnecessary in this subclause.

I will then propose that we delete the words from "except where the interests of State", and let the subclause read:

"Judgments in criminal cases shall be given in public."

MR HAUSIKU: Mr Chairman, I think this refers to public judgment and not to fair trial. That is what I think.

MR KATJIUONGUA: Mr Chairman, I am supportive of what Mr Matjila said, but I want to make it slightly different. But I just want to point out, in the light of what he said and statements made here, that is we can accept moneys from outside, if we can even copy outside constitutions, then there is nothing wrong accepting outside advice. In

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my statement yesterday I said I have made improvements also after talking with well-wishers and I also invited that this committee should ask the UN and OAU and others to make some inputs to improve the Constitution, so that at the end of the day we have a next to perfect Constitution. That is my goal.

So, on the relevant section in question I would like to rephrase it in the following way:

"Judgments in criminal cases shall be given in public, except where juvenile persons or other circumstances, which in the opinion of the court, require otherwise."

MR RUKORO: I was going to argue for the retention of the subparagraph as it is. I don't think it is in any way undemocratic, it is consistent with international standards and I can quote from Article 14 of the Covenant on Civil and Political Rights which says:

"In the determination of any criminal charge against him, or of his right and obligations in a suit at law, everyone shall be entitled to a fair and public hearing.

The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society."

I think our own formulation is consistent with this international standard, it is no less democratic. Thank you.

MR KATJIUONGUA: Mr Chairman, in Article 12(1)(f) only a question as a matter of information.

"No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a customary union, and no Court shall admit in evidence against such persons, testimony which has been obtained confidentially or in violation of Article 8(2)(b)."

I thought we have inserted the word "confidentially", but if I am wrong I will accept that.

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CHAIRMAN: I am told your recollection is wrong.

ARTICLE 12 AGREED TO.

ARTICLE 13 PUT.

MR KATJIUONGUA: Mr Chairman, I think this Article 13(2) should be changed as follows, and I got this also from outside advisers, I am not plagiarising:

"Searches of the person or the homes of individuals or associations..."

MRS ITHANA: On a point of order. Mr Chairman, I am sorry to interrupt the honourable member. The honourable member has been a member of the committee. There in the committee we negotiated. We put these articles the way they are, sometimes in view of a provision in the future to come. If we start changing articles here, renegotiating, we will end up changing the whole document altogether. My appeal is that we keep the contents as it is here.

MR KATJIUONGUA: People have changed a couple of things here and the word "renegotiating" was never used here, so it is incorrect. But since the lady is my sister, and I would not like myself to behave in the way Mr Matjila said, I sit down and I keep quiet.

MR WENTWORTH: In sub-article (c), the third line, the "is" there should be "as".

ARTICLE 13 AGREED TO.

ARTICLES 14 - 18 PUT AND AGREED TO.

ARTICLE 19 PUT.

MR KATJIUONGUA: Mr Chairman, on a second thought, not reopening the debate, and on advice as well, if we simply say "...do not impinge upon the rights of others" and stop there, without talking about the national interest, which is a wide concept and could mean that you are giving with the one hand and taking away with the other hand. But if the House feels otherwise, I have no strong objection, but simply as advice.

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MRS ITHANA: I object, Mr Chairman. We cannot afford to have cultures that are not in the interest of the nation. Why should we delete "national interest?" People are people, but the nation as a whole, cultural interests must go hand in hand with that interest.

MR MUDGE: Could the honourable member give us an example of what culture could threaten the national interest? Does she have anything in mind?

MRS ITHANA: We have discussed this paragraph at length, we know what is entailed. It is only that Mr Pretorius is not here, unfortunately. Some cultures can cause conflict within the nation. Apartheid for example, if certain cultures will start practising those aspects, that will dis-unite us as a nation.

MR DE WET: I want to talk on culture, but at this stage I move that the debate be adjourned until tomorrow.

ADJOURNMENT OF ASSEMBLY

On the motion of the Chairman the Assembly adjourned at 18h30 until Wednesday, 31 January 1990 at 10h00.

CONSTITUENT ASSEMBLY

ASSEMBLY CHAMBER
WINDHOEK
31 JANUARY 1990
10h00

The Assembly met pursuant to adjournment.

RESUMPTION OF DEBATE ON DRAFT CONSTITUTION

ORDER READ:

Resumption of debate on Draft Constitution.

ARTICLE 19.

MR DE WET: Mr Chairman, I thank you for the opportunity.

Ek wou nou vanmôre in Boere-tradisie met my kakieklere hier aangekom het. But I don't think it is appropriate, because I am going to address this House in general about culture, and I believe in the committee we had our reservations as far as this clause is concerned, and ACN still has those reservations.

According to us, Sir, this clause does not properly provide for the persons belonging, by way of voluntary association to, inter alia, ethnic groups, to enjoy, practise, profess, maintain and promote his culture, that there would appear to be no reason why that cannot be conferred upon any individual in accordance with the terms of Article 27 of the ICPR - International Covenant of People's Rights, which reads as follows:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group to enjoy own culture, to profess and practice their own religion or to use their own language."

: According to this clause as far as culture is concerned in the Draft Constitution, we don't think it makes provision for what has been meant by this specific clause in the ICPR.

The contents of the said Article 27 of the ICPR has attracted the attention not only in many countries of the world, but also in the UNO, which instituted a committee,

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known as the Sub-Commission on the Prevention of Discrimination and Protection of Minority Rights, which published a report under the chairmanship of a so-called Special Rapporteur, Francesco Capotorti, entitled, "Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities."

It is clear from the report and the foregoing that it is a generally accepted concept throughout the world that the rights of ethnic, linguistic and religious minorities be acknowledged, but subject of course to the equality principle. I think this remark is very important, that it is subject to the equality principle. So, there cannot be seen any apartheid in this. They are emphasising the equality principle. Therefore, according to us, we must embrace the realities of this country of ours. That will give us durable and lasting peace. So, we do believe that if this clause is changed and we move that it be changed or substituted with:

"Every human being belonging to any culture, linguistic or religious group, shall have the right, whether as individual or by way of any such group to enjoy, maintain and promote his culture and traditions, to use, maintain and promote his language and to so profess, maintain and promote his religion in so far as the exercise of any such right does not infringe any right of any other person or the public interest.

The provision of subsection (1) shall not be construed as authorising the classification of any human being by or under law by reason of race or colour."

I move.

CHAIRMAN: We have allowed the honourable member to make a statement for the record and we have listened to him, but for the sake of the press and the public, I would just like to read the article concerned to prove that it meets with the requirements:

"Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution, and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or the national interest."

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So, that has already been adopted.

PROF KERINA: Mr Chairman, on the question of culture, I think I have a problem.

CHAIRMAN: Yesterday I said we would allow Mr de Wet to make a statement, but we have adopted this article already.

ARTICLE 19 AGREED TO.

ARTICLE 20 PUT.

MR KAURA: Mr Chairman, on subparagraph (2), the last sentence, "education will be provided free of charge to those in need." I would like it to be changed to, "education will be provided free of charge to all", not those in need. How do you define those in need? To all Namibians.

CHAIRMAN: The debate in the committee was that some people can afford to pay for education. If you say "for all", are you also going to subsidise my child while I am in a position to pay?

MR ANGULA: Mr Chairman, of course we want to maintain the principle of equality, but the problem is that some are more equal than others, and we are saying that those who are more equal than others, should pay in order for the State to be able to assist those who aren't in a position to pay. So, I think what has been attempted here is to say that as much as we are committed to free education, the resources may not permit that this free education will be extended to all.

So, the idea is that those who are in a position to pay should do so, in order to spread the resources out to those who are not able to do so. But I am not very strong on these three words, "to those in need", because it may require that we have to define those who are in need. I don't know how we are going to do that in the Education Act.

CHAIRMAN: I think we should just say "free education for all."

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MR MUDGE: Mr Chairman, we don't have a problem in principle at all, it is just a matter of formulation. It was suggested that in paragraph (4), instead of just referring to tertiary education, we should insert primary, secondary and tertiary education. One of these documents which you distributed to the Assembly also suggests - and I think there is a point in this suggestion - that the word "tertiary education" should be repeated in 4(a) and (b). That is just a suggestion, it is a matter of formulation.

CHAIRMAN: So decided.

ARTICLE 20 AGREED TO.

ARTICLE 21 PUT.

MR KATJIUONGUA: Mr Chairman, I would like to request that subarticle (1)(a) also becomes non-derogable.

CHAIRMAN: In Article 24 we talk about derogation and non-derogation, it is arranged there. Sub-article (1)(a) is adopted. 1(b)

MR KATJIUONGUA: Mr Chairman, in view of our past experience here and the fact that in many Third World countries you find armies, not policemen, invading institutions of high learning, like universities, I would like to include:

"(b) freedom of thought, conscience and belief, including academic freedom in institutions of tertiary education."

CHAIRMAN: The amendment is accepted.

MR MUDGE: Mr Chairman, mine is just a question on sub-article (2), and I want to refer this to the lawyers to see if they agree with me or not.

These fundamental freedoms referred to in Article 21, are they only applicable to citizens or all persons? Will any person visiting the country be free to leave and return to Namibia, settle in any part of the country, etc? I am not hundred percent sure whether we are referring to citizens or whether we are referring to persons. It might be a legal question, I just want to raise the question.

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MRS ITHANA: Mr Chairman, if my recollection serves me properly, I think we agreed in the committee that it should be all citizens. Foreigners cannot come and go as they wish, they are not Namibians.

MR RUPPEL: Honourable Chairman, it was referred to the lawyers, it was discussed and they pointed out to us, in Sub-section, (2) which says that restrictions can be placed on foreigners, which are normally acceptable in a democratic society. With that, I think, we ended our discussion previously. I don't see any point in referring it again to the lawyers.

ARTICLE 21 AGREED TO.

ARTICLE 22 PUT AND AGREED TO.

ARTICLE 23 PUT.

MR DE WET: Mr Chairman, scrutinising this clause and reading it, that "the practice of racial discrimination" - with that I don't have any problem - "and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts...", seeing that there are such a lot of references in this Constitution to apartheid, surely I would like to know what we understand by the ideology of apartheid, what is the definition of apartheid, because anybody practising or propagating such practices will be subject to punishment by Act of Parliament, and I think for clarity and to ease the minds of some of us in this country, we should get from the legal advisers a definition of what the ideology of apartheid means.

CHAIRMAN: I think all the parties are clear, since we are in Namibia, what we mean by apartheid, but ACN could get a lawyer's advice on this. This was debated in the committee, the same issue was raised and the other people are very clear on what is meant by apartheid. But if ACN has a problem they can get that advice.

ARTICLE 23 AGREED TO.

ARTICLE 24 PUT.

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MR KATJIUONGUA: Mr Chairman, on Sub-article (3). As I tried to say earlier, I think as a new civilised nation we should make Article 21(1)(a) non-derogable, and therefore on page 20, Subsection (3), "... or freedoms referred to in Articles (1)(a)" and then continue with the rest of them.

MR KAURA: I have a slight problem with Sub-article (3) under Article 5 up to 21, in view of the fact that we still have a controversy on Article 11. Depending on how it would be adopted, I would like Article 11 to be one of these here, until such time it is decided on one way or the other.

CHAIRMAN: So when we decided, we can reopen on that one only, since Article 11 has been shelved.

ARTICLE 24 AGREED TO.

ARTICLE 25 PUT.

MR KATJIUONGUA: Mr Chairman, I have no problem with (4), my colleagues can remind me and the Chairman himself as well, I thought that when we were discussing this article we did agree that Namibia shall associate itself with, and ratify - but that was my own view - some of the international conventions on human rights, more specifically the International Convention on Civil and Political Rights and a number of African conventions, Algiers and Nairobi, on the same matters which I think should also be included as paragraph (5), so that we associate ourselves with and ratify these conventions. I can produce them in due course, the ones I have in mind, but just for the purpose of requesting the House that we ratify these conventions which are universally accepted by democratic countries, especially by most of the African countries, the Algiers one and the Nairobi one as well.

DR TJITENDERO: Mr Chairman, I have no problems with the submission of honourable Mr Katjiuongua, I am just thinking out loud and I wonder, if it is wise to have this particular provision in the Constitution, whereas we already provide provisions for ratification somewhere in the Constitution. I think the relationship with other nations

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DR TJITENDERO

is a variable, and I wonder whether this could not be dealt with outside the provisions that are enshrined in the Constitution? I am only asking the question, not disagreeing with you. Would the Constitution be the right place to place that kind of provision or would that kind of provision still come under a separate act of parliament or conventions that are entrenched into international relations, treaties, etc., etc., as we have already committed ourselves to adopting some of the international conventions. It's just a question.

MR RUKORO: I just want to react to what honourable Dr Tjitendero has said, namely that I think it will be ill-advised for Namibia to include as a constitutional provision a positive requirement, or actually to simply by reference accede to all these international conventions without having had the opportunity through the government of the day to actually study all these conventions carefully and to decide that they might want to make reservations to one or two clauses in any one of these clauses.

For instance, if we take the example of the Covenant, apart from the Covenant there is the Protocol and one needs to make up one's mind whether one is to ratify both the Covenant and the Protocol. I think these are very important matters of public policy and cannot simply be the subject of a constitutional provision at this point in time. I would want to see these things referred to the future government after making a careful study of each and every provision of the conventions.

MR KATJIUONGUA: Mr Chairman, if the attitude is not one of rejection, but of finding some kind of a backdoor to attend to this problem, I hope the same spirit in which these things are now said will prevail when we cross that bridge. I hope it won't change. All I am saying is this, it is important for me and the reason for that is that it places an obligation on the State, inter alia, to file reports on its human rights record. That is why I thought that a constitutional provision or requirement will oblige the government of the day to be able to be careful on that record and to feel obliged to produce a human rights record annually.

But if my colleagues who would be in the government will

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MR KATJIUONGUA

bring it up to that government and bring it to the Assembly I have no problem, time will tell. Thank you.

MR BARNES: Mr Chairman, affording me the opportunity to address you on this matter, there are a few other matters that I wish to add, inter alia, that I think it is perhaps time that the members take cognisance of the dress in this honourable hall, that it complies with the dignity of this historic and important occasion.

Apart from that it would appear that there is an enormous amount of members that are suffering from back-ache as they do not bow and give respect to the Chair at the appropriate times. I think it is high time that we address those matters and make mention of it.

As far as the submission of my honourable colleague, Mr Katjiuongua, is concerned, I am inclined to agree with him that anything that we can build into the Constitution to protect human rights and to assure human rights in the future of an independent Namibia, is of great importance. Whether the Protocol or whatever is attached to it should be submitted or not, I think that is something that we can agree upon. Because when it comes to human rights, Sir, it is an extremely sensitive situation, thinking of the past, and that is why I am of the opinion that it is important that anything that we can include in the Constitution to protect human rights and to give it every opportunity to be implemented in this country should be favourably considered, and I will ask that the honourable member Mr Katjiuongua perhaps addresses us before the acceptance of the final draft on this matter to see whether we can consider his submission.

ARTICLE 25 AGREED TO.

ARTICLE 26 PUT.

MR MUDGE: Mr Chairman, on Sub-article (2)(a) I just want to ask, maybe it is hypothetical, but can the president, after the whole procedure has been gone through, can he repeat the declaration of an emergency? Can he just continue, bring the matter back to the Assembly, the Assembly turns it down and he can repeat the declaration? I think we must make sure that this is not a possibility.

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MR RUPPEL: I think the answer to that kind of problem is the court. If somebody feels that the president abuses his powers and he acts outside the ambit or scope of the enabling provision here, then the court will tell him so and the further attempt to declare an emergency will then be sorted out.

MR MUDGE: I am not satisfied, but of course, there are other ways of dealing with this matter. In any case, I hope it will not happen, but I just wanted to warn.

MR KATJIUONGUA: Mr Chairman, it is only an ambiguity that is here in Sub-article (7). It says:

"The President shall have the power to proclaim or terminate Martial Law. Martial Law may be proclaimed whether or not a state of war with another country exists.."

I have no problem with that, but my problem is here, it is not very clear what it means: "... but only in a situation in which war prevails." I think that should read "... or when a state of civil war or unrest exists in the country." Then it is quite clear. I think what is implied here is internal turmoil, but it is not spelled out what it is all about. My suspicion is that it either refers to civil war or civil unrest. Then I think it must be defined clearly.

MR MUDGE: Mr Chairman, I want to support the honourable member and I want to refer to the same words, "in a situation in which war prevails." I understand that right now in Zimbabwe they have declared a state of emergency because of a so-called situation in which war prevails. Does that also include, for instance, a situation which prevails in a neighbouring country?

I think we must be very careful, Sir, to clearly define here what do we mean when we talk about a situation in which war prevails. Some or other protection or safeguard must be built in here. This is too vague just to say a situation of war prevails.

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MR RUKORO: What if we substituted the word "war" for "a situation involving an armed conflict"?

This is one aspect on which we might want to have a second thought in consultation with the lawyers, because I have a slight suspicion that there could be some technicalities involved in simply confining this to civil wars and not, for instance, the broader phrase of armed conflict. So, could I therefore request that rather than settling this issue now, we take a second look in conjunction with our lawyers on this aspect.

MR GURIRAB: Mr Chairman, since we are trying to stretch our minds about possibilities in the future, I can foresee a situation in which a peaceful democratic Namibia's life and security might be threatened by a situation that exists in one of the neighbouring countries, and there would be a spill-over into our country, not because we want it. The situation referred to in Zimbabwe relates to that kind of situation. There is no war presently in Zimbabwe, but there is an armed conflict, a war if you will, in neighbouring Mozambique, and unfortunately this has a spill-over effect into Zimbabwe and the Zimbabwean citizens are dying, property is being destroyed. So, in re-formulating the article we should be openminded about this.

MR MUDGE: Mr Chairman, now I have even more reason for concern. If a war prevailing in Angola will be reason enough for the president of this country to declare a state of emergency ...

MR GURIRAB: On a point of order. You will always misunderstand me if you don't listen carefully. Only to the extent that what happens beyond our borders might affect peace, tranquillity and security in Namibia, only to that extent, not because war is taking place outside our borders, no.

MR MUDGE: What the honourable member said now does not in any way put my mind at ease. Who is going to decide whether the war in Angola will be affecting the position in Namibia? You must remember, Sir, that we have now accepted, just minutes ago, Article 24, which makes provision for the derogation from all articles in this Consti-

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tution including the Bill of Fundamental Rights in the case of a state of emergency being declared. We have made provision to detain people in terms of Article 24 in case of a state of emergency, and that means that if there is a situation of war, if the situation of war can so be defined, that a war in Angola affects the security situation in Namibia, a state of emergency is declared with all the possible results, then I think we must be clear on exactly what do we mean by "a situation of war prevailing in the country."

Sir, we cannot just let this go by easily, and for that reason - and I am sure the honourable member would also want to have more clarity on this - I feel that we must have a look at the exact meaning of this.

CHAIRMAN: We will refer it to the lawyers and outside discussion.

ARTICLE 26 AGREED TO.

ARTICLE 27 PUT.

MR KAURA: Mr Chairman, I would like to add under (1) a sub-article which will read:

"The President must be a Namibian citizen by birth."

CHAIRMAN: Agreed.

MR DE WET: But then we must determine the boundaries of the country first. LAUGHTER.

MR RUPPEL: In Article 28(3) we deal with the qualifications for the President to be eligible for elections. I think it should be there and not somewhere in the head of that part. There it says, it must be a citizen, and now it is qualified to be a citizen by birth.

MR ANGULA: Mr Chairman, I have a difficulty with this qualification. What will happen to a child of my brother, Mr Biwa, born somewhere in Zambia and who assumes Namibian citizenship by descent?

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CHAIRMAN: By descent is covered I am told.

MR BARNES: Mr Chairman, on Article (1). I have no problems with this birth, I have made my contribution as far as Namibians are concerned, so they will qualify in future. I have problems with this "his or her". In the committee, if I am allowed to recall, we said: "The executive power of Namibia shall vest in the president and the cabinet." That covers both genders, because it is in any case the prerogative of what gender the president might be in future to have a cabinet, and I cannot for the dear life of me see the importance of "his or her", because the emphasis is on the executive, which consists of the president and the cabinet.

ARTICLE 27 AGREED TO.

ARTICLE 28 PUT.

MR KATJIUONGUA: Mr Chairman, as you remember in the committee, after some of us were asked to talk to our legal advisers about this particular problem in (2), then later we came with a proposal along the same lines which was later read out to the House and accepted. I am not saying what stands here is not correct, I only say it is very unclear, and to add to my suspicion that it is very unclear, I think you all saw this thing by Totemeyer, and he has exactly the same problems I have, why I think it should be made much more clearer.

He says:

"Article 28(2)(b) is where my problem is. The part, as it stands, "until such result is reached", could theoretically lead to a drawn-out process with the possibility of a deadlock. My feeling is that all candidates who have less than 10% support, no one having achieved more than 50% during the first ballot, should be excluded from the second ballot. If no candidate receives more than 50% during the second ballot and a third run is to be held, only two candidates with the highest support should be allowed to partake in the final ballot."

So, the proposal I made along these lines, which was read to the committee that day, which was actually in essence the French model of presidential election, I said the

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president of the Republic shall be elected by direct, universal and equal suffrage for five years, and then later it becomes two five year terms. And then secondly, the president is elected by an absolute majority, 50 plus 1 percent of the votes cast. Where this is not achieved in the first round, the two candidates with the highest number of votes proceed to the second round, which shall take place two weeks after the first round. This is the specific proposal I made that day, just to try to clear up what Totemeyer is talking about.

MR ANGULA: I am not objecting to the proposal, to me that seems to be procedure and I would like to suggest that it comes in the schedule, not in the body of the Constitution.

MR KATJIUONGUA: I will accept that.

CHAIRMAN: Sub-article (3). We are adding "a citizen born in Namibia" or by descent also?

MR BARNES: Mr Chairman, the problem that I have with the words being placed in the Constitution, "every citizen born", I can almost say would be in conflict with the Bill of Fundamental Rights, because should a parent apply for naturalisation, would that exclude that person just on the grounds of "born in Namibia?" I think the fact that we say "every citizen" is adequate, because there are specific rules in this Constitution that grants citizenship. We must not make ourselves the laughing-stock of the world by just adding things which we think sound popular or nice. We must write the Constitution with the future in mind and not to shoot at a particular political ideology or whims of people.

ARTICLE 28 AGREED TO.

ARTICLE 29 PUT.

MR MUDGE: Mr Chairman, it is just a technical problem that I have here: "The President shall hold office as president for not more than two terms", but here they say "two full terms." Does it mean that if he had two terms of four years each that he would be able to stand for election for a third term? I just want to make sure, why "two full terms?" Say for instance he dissolves government six months before the end of the first term, he is elected again and he does the same? I agree it is

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technical, but shouldn't we be very clear on this one? We might end up in court.

MR ANGULA: I agree with Mr Mudge, but this particular reference was actually that if you had somebody assuming presidency, say one year before the next election, as is provided for in the Constitution that you can actually succeed to presidency for 12 months before the elections, then those 12 months will not be counting as part of the five years. So, if you are elected, you will have your first term of five years and your second term of five years if you are elected again, including the 12 months you held the presidency on succession. This is what was meant by this, but it can be made clear.

CHAIRMAN: How do we make it clear? Two terms.

MR RUPPEL: I am not opposing this, but I want to draw the attention of the House to Sub-clause (3) where there is also provision made for circumstances under which the president may have to leave his office. So, the instances here, referred to in subparagraph (1), should also include a reference to the circumstances referred to in Sub-section (3). It is perhaps just something for the lawyers to draft. But he doesn't only leave office in the circumstances now referred to in (1), but also in the circumstances referred to in (3).

MR TJITENDERO: I think the word that is missing is "two consecutive terms". It is not just two terms.

MR KAURA: Mr Chairman, if the president loses one election, he serves one term, then he has an opportunity to come again after another five years. So the terms do not have to be consecutive. Two full terms.

CHAIRMAN: Two terms.

ARTICLE 29 AGREED TO.

ARTICLE 30 PUT.

MR KATJIUONGUA: "Before formally assuming office, a President, including the first President..." Why I am

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saying so, there is an animal on Schedule 7 which says that the Secretary General of the UN will come and administer the oath. That is something I will never accept, I think it is a demonstration of lack of confidence in our own people, whom we said could continue their office here, we agreed that the Judge President, acting as if he was the Chief Justice, will administer the oath of the first President.

So, this Constitution is permanent, we agreed that the provisions that are applying to the next president will apply to this one as well. So, why make an exception?

Therefore I want it to be mentioned specifically that a president, including the first president, will take oath in that manner and Schedule 7, that the Secretary General of the UN will do it, goes.

DR TJIRIANGE: Mr Chairman, I think this article has to stand as it is, and if we have a problem with the UN Secretary General, then we take him out there, when we start discussions on the transitional provisions.

CHAIRMAN: The article is for eternity, so we cannot bring in the first president. The Schedule will be removed.

ARTICLE 30 AGREED TO

ARTICLE 31 PUT AND AGREED TO.

ARTICLE 32 PUT.

MR GURIRAB: Mr Chairman, can throughout this document where it appears, "his or her cabinet" be substituted for the words "the cabinet", because it seems we have a hang-over from His or Her Majesty's Government.

MR BIWA: Mr Chairman, if my recollection of the discussion in our committee is correct, we had a long discussion on Sub-article (2) and we ended on the note that this article would be redrafted in such a way to allow the president unrestricted access to the parliament or vice versa, because we had a concern that we would not get a chance to ask the president questions on his policies and we were accommodated somehow. That is why I want to refer

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this paragraph for redrafting.

As it stands here, it is not clear to me whether the president has the right to address parliament at any time, other than the session referred to in this sub-article. Therefore I would suggest that we redraft this part in such a way to give the parliament unrestricted access to the president.

MR HAMUTENYA: Mr Chairman, what we now have is actually a reformulation to take care of the issue that honourable Biwa is raising. If he takes a look at the previous draft, he will realise that it reads different from this one; and the very last clause was inserted precisely to meet the very concern he is raising now. So, this is definitely a redrafting in accordance with his own concern. Thank you.

MRS ITHANA: As my colleague has mentioned, this is the product of the redrafting, and if I can recall the argument of some people in the committee, they were asking, why restrict the president to the budgetary sessions only? But the requirements were that he must be present when his budget is being discussed. So, that interest is taken care of there.

MR BIWA: Mr Chairman, this sub-article as it stands here, to my understanding only provides that the president will attend one session of the parliament, but it doesn't say that the president should come to parliament whenever the parliament needs him to do so.

Therefore I would venture to suggest an addition to this sub-article along the following lines. I don't know whether it has to be inserted somewhere or whether it has to come as another sentence, but what I would like to have is: "The president will address parliament and answer questions whenever the parliament so wishes." I don't think the parliament would be so unfair to summon the president every now and then to parliament, because we know that the president has other commitments to attend to. But times may come that the parliament would like to

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have clarity on some questions, on some policies and actions of the president, and then the parliament should have that right to seek clarification from the president on those questions. Thank you.

CHAIRMAN: The honourable member will recall there was a draft saying that and some honourable member said we cannot be impolite to the head of state, honourable Mr Mudge, that the parliament cannot demand, cannot ask the president, but he must come because he has an obligation, answerability to the parliament.

MR MUDGE: Mr Chairman, on Sub-article (3)(b) I want to make sure whether the Assembly itself will also be able to determine the times of sessions. I have no problem with the right of the president to call special sessions of parliament, but I want to refer you to Article 61 for the purposes of this discussion:

"The Assembly shall sit at its usual place of sitting determined by the National Assembly."

It is here determined that there should be at least two terms, but no provision is made for the Assembly itself to adjourn until a specified date, and I think the Assembly itself should also have some say about the sessions, when they want to sit, for how long they want to adjourn. So, when we come to Article 61, Sir, I will make the proposal.

But just to make it possible, I would suggest that we say in this particular paragraph (b), "determine times for the holding of sessions of the National Assembly", and just make sure, after we have discussed Article 61, that the one provision will not be inconsistent with the other one. I think this is also a legal problem, but as long as we agree on the principle that the Assembly itself must also be able to determine at what time they want to sit.

MRS ITHANA: Honourable Chairman, this issue, once again, was discussed in the committee and we were assured that the House is going to have standing orders and it will be the standing orders, which will be determined by the National Assembly, that will guide the president in determining the sessions of the Assembly, and the president is not going to do it on his own, but in consultation with the speaker of the House. Therefore it was said this is a

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formality, the president has to hear from the speaker of the House.

DR TJIRIANGE: I don't have any problem with the addition, but I have a problem that here we are talking about the National Assembly. Does it include the National Council?

MR RUKORO: I was going to support Mr Mudge on everything he said, but also go further and say that in (3), where we talk of the power of the president to determine the times of holding sessions of the National Assembly, that we specifically refer there to the provisions of 61(3)(c), namely the reference to special terms only, to make it clear that when we say the president shall determine terms, it is only with reference to special terms.

MR BARNES: Mr Chairman, may I submit that this clause is in total conflict with the concept of division of powers. Should the second election arise after this situation that we have now, there will be a distinct separation of powers. The president will be elected by the people, under certain circumstances he will be accountable to the people. Not being a member of the National Assembly, having division of powers, I do not see how it is possible under the concept of division of powers that such a person can then determine the times of the sessions of the National Assembly. I think if we make provision that he has the power under special sessions or emergency sessions, then we are defining the whole matter properly. But as it stands here it does not solve the problem and it is in conflict with the concept of division of powers.

CHAIRMAN: We have just discussed Article 32(2) where he has to come and report and be answerable. Are you saying that is also in conflict with the division of powers?

MR RUKORO: Mr Chairman, we support Mr Rukoro's proposal.

MR KATJIUONGUA: Mr Chairman, Article 32(3)(f): As I said

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the other day, the question of declaring war is a matter of national death or survival. Number two, I said that we do not want our president to fight unpopular wars, and I referred to the case of Vietnam, which, as all of us know, ruined Pres Johnson and Robert MacNamara. So therefore, I would like this article to read as follows:

"(f) declare martial law or if it is necessary for the defence of the nation, to declare a state of national defence..."

Not war. War sounds very aggressive. I think the time when the Americans were referring to war was about a hundred years ago.

"...declare a state of national defence, with the approval of Parliament, that is, a simple majority of both Houses or two-thirds of the National Assembly within a reasonable time."

So, he can declare it first, because we can't expect the invaders to come all the way to Windhoek before the Assembly can meet to approve the declaration. But subsequently, after it has been declared, it must have the approval one way or the other by the representatives of the nation as assembled in parliament.

So, first of all we take out the declaration of war and say "a state of national defence, etc."

PROF KERINA: Mr Chairman, it should be "a state of national self-defence."

CHAIRMAN: Any objections to the amendment?

MRS ITHANA: I am not objecting to the amendment, it may be recalled what I said in the committee concerning the declaration of war. But if we are declaring a state of defence against an aggressor, we are not going to aggress anybody, we are defending ourselves, why should this be taken to the National Assembly? Of course, I suppose the president cannot just declare a state of national defence without informing the legislative body. It seems that we are insisting so much that everything the president does must be reported to the House, it must be approved by a two-thirds majority. If it is a declaration of war, I agree with my brother here that it must have the approval of the House, but if we are defending ourselves,

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the House must be informed.

MR KATJIUONGUA: Mr Chairman, I did say many times in the committee that unfortunately when we are talking about institutions over a period of time, a constitution that will overstay - individuals come and go, we are not talking about a particular president - and therefore I hope that my colleagues will not be emotional that we are talking about a particular president that will take power now. I am talking about institutions for the long term.

It did happen that America was committed to something that was a sort of military reaction and it turned out to be a war for twenty years which the American people did not support.

So, all I am saying, I don't want to tie the hands of our president to declare a state of national defence, because parliament might be on vacation and action has to be taken now. So he must do that, but after he has done that, he must come back to the nation and say, "I have done this for this and that reason, what do you think about it?" I am not trying to weaken the powers and abilities of the president to take action when there is trouble. So, I think we should not discuss this emotionally, I think we should discuss it institutionally.

MR ANGULA: Mr Chairman, I would like to join honourable Katjiuongua that we should discuss this very soberly, and I would like to suggest to him that his concerns are actually taken care of in Article 29(2), as well as Article 32(a). Those two paragraphs for sure do take care of the concern of honourable Katjiuongua. If the president declares an unpopular war you can impeach him. If the president declares an unpopular war, you can review and reverse that decision in the Assembly. So, that is taken care of.

MR KAURA: In a state of emergency or in a state of war the president is also provided with the powers to suspend the Constitution, including the Bill of Fundamental Rights. So, that would mean that there would be no par-

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liament to impeach the president.

MR GURIRAB: Mr Chairman, I was a bit at a loss when honourable Mr Katjiuongua made his first intervention, but his subsequent elaboration clarified my mind. I don't know what we are going to do with the phrase "to declare war". There is a new phraseology, "to declare a state of national defence." Why not? We will contribute that to the vocabulary of international politics and jurisprudence. It sounds better than war, even if you are going to end up doing that, namely waging war. So, whatever we agree on, I have no problem.

The element of the need to consult the National Assembly, I heard him saying that there would be unforeseen situations in which the president may have to react to a given situation on the ground, but he should be compelled somehow, it is expected of him to report to the Assembly. If, therefore, we are trying to formulate something along those lines I will certainly agree.

CHAIRMAN: So, there is a need for the president, after having declared war, to report or to seek approval. Is it reporting or seeking approval?

MEMBER: Seek approval.

CHAIRMAN: Approved.

MR BARNES: Mr Chairman, I just have an amendment to add to (g):

"establish and dissolve such government departments and ministries as the President may at any time consider to be necessary or expedient for the good government of Namibia and to advertise in the Official Gazette of such establishments of such ministries and dissolution of such ministries",

so that this does not appear to be something under the table and you wake up one morning to hear there is a department that eliminates females.

CHAIRMAN: Any objection to that?

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anybody - it is our own inexperience as people who are trying to look at various models and pick and choose from what is available to us as well as our own idealism and dreams.

So, I am trying to say that the conventional methods that are used in this region and in other parts of the country are three and they cover exactly the categories that we are concerned with. These are: 1) appointments by the head of state and/or Judicial Service Commission; 2) entry into judicial office through civil service, and 3), election to the judicial office.

When we consider appointments, i.e. by the President, we should not again, as honourable Katjiuongua has submitted, look at the designated persons, we should look at the institutions or the positions as proposed.

CHAIRMAN: Could you repeat that? There seems to be a technical problem?

DR TJITENDERO: Honourable Chairman, I was just giving three criteria and I admitted, as a member of the committee, that there is lack of clarity in terms of making a distinction between the purely political appointments and civil service appointments.. I think this is something that the committee can easily go back to, reconsider and submit a more clear criterion for the appointments of the senior officials in question.

It is very normal in Common Law countries that appointment by the head of the State and/or the Judicial Service Commission is normal practice in the Common Law countries. I have said the third category I was going to come to, is the election to the judicial offices, and let me quote here again just to show that the appointments as put here are not out of order. They are very much in order in establishing the structures that we want to establish.

We are concerned with the chief justices, the chief of defence, inspector general of police and that will go down to auditor general and governor of the bank. I think the distinction we are trying to make here, is that if the head of state appoints, of course he appoints on the recommendations of the Judicial Service Commission, Public Service Commission, etc. These are professional bodies. The appointments are made, but the recommendations and the shortlisting are done by people who have the know-how, the professional bodies. The president then chooses among the list of the names given, he may choose or may say the list is very poor or the persons are not suitable for these

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posts. So, the head of state can appoint people into the civil service structure on the recommendation of the civil service which will be civil service posts. Good examples are found in the Common Law or the English Law, and let me give an example here of the Solicitor General and/or Attorney General. I quote:

"The historic role of the Attorney General and the Solicitor General, their historic role is to represent the Crown in the courts. They now act as legal advisers to the government on important matters, which cannot be left to the lawyers in the civil service, to advise the departments on day to day matters. The English Law Officer and officers today invariably are members of the House of Commons and of the English Bar. As ministers they support the government of the day."

I am quoting these sources to support the structures as they stand there, but I will make an amendment because of the oversight on our part in the committee, this is one area which could easily go back to the drawing boards to make the specific recommendations with a clear distinction between civil service posts, which I think is the concern here, a legitimate one for that matter, and those posts and positions that will be political appointments. The chief of defence, appropriately, will of course be nominated by the head of state, recommendations coming from the appropriate professional bodies, the inspector general of police, the same, recommendations coming from the appropriate professional bodies. So, it is not the other way around that the president nominates and the officials are appointed by either the Judicial Service Commission or the Public Service Commission.

On the question of the size and composition of these structures, I think that is a legitimate concern to look into at a later stage.

In conclusion I would like to submit that this is one area where we can very humbly accept our shortcomings in what is submitted here and easily go back and come back with very clearly delineated structures. The appointment criterion does not change, I still submit it stands. Thank you.

MR ANGULA: Mr Chairman, I just want to add one or two words in the tradition of my earlier submission in the

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committee, and I am going to talk about the chief of the defence force as well as the appointment of the inspector general of police. I would like to agree with honourable Katjiuongua that these are very sensitive positions or posts, especially in the formation of a new nation, very sensitive indeed. I equally want to agree with Mr Siseho that these people should be civil servants once appointed and they should serve in that capacity. However, I would like to raise a few of my problems with regard to the nature of the appointments.

I do fully realise that we are emerging from the dark past and we can't deny that. Mr Mudge yesterday was very candid - speaking on a different topic - about the kind of things he felt he had to do in the past in order to defend what he thought was the state or the security of the country. If we are not careful and the procedures of appointment of this kind of people are made as it has been recommended by my other friends, we are going to open unnecessary wounds. I would like to say that for the sake of looking to the future, let us leave these appointments to the head of state on the understanding that for sure there will be consultations with all the people concerned, that these people are acceptable to the cross-section of our community.

But if you are going to have approval by the National Assembly, then what that means is actually to have hearings, and we have to go into the past and the characters of those people. I am not quite sure whether it is going to serve any purpose at all. So, I would like therefore to suggest that we leave it like it is on the understanding that there will be full consultation with all members and all people concerned. Thank you.

MR KATJIUONGUA: I agree with the sentiments of my two brothers over there. I do understand the complications, make no mistake about it. But here I think we are dealing with a constitution that should be there for a long time and we may not have to make amendments in a short period of time.

So, I think the method of consultation you are talking about, especially in the first phase of this country, it might even cool down the heads of members of parliament if the president - if the procedure stands as I recommend - before he sends his people to the Assembly, will consult with members of parliament, maybe the relevant standing

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committee to explain his case, the circumstances and that sort of thing, which I think could guide parliament in handling these appointments. That sort of dialogue and communication and consultation I accept. And I think if that method that you recommend is followed, then I don't think there should be major problems to get these people confirmed.

What I am afraid of is to make an exception for this particular case, whilst similar cases will come up in the future and we have no intention to amend the Constitution very often.

So, I think, if you all understand and put emphasis on the need for consultation, that the president will talk to parliament or the relevant standing committee about these things, then I do not foresee that we are going to have problems that President Bush was having with the secretary of defence designate, all these problems of alcohol and so on, womanising. I don't think in an African context people will go into those type of things. Maybe in a sense we are like in Greece, you will remember the case of Pappandriou.

But I think the procedure should remain, but I agree with you totally that the method of consultation is important to make these things not become a public problem. So, I only back you for the sake of the constitution continuity, that these things stand like this, but we all put emphasis on co-operation, working together and making sure that the government does not become bogged down before it takes off.

So, you can have my understanding and my support that I will be willing, very much so, to consult with our colleagues in this matter, so that we don't have problems before we take off.

The method I proposed, Mr Chairman, is actually not an anomaly, but it is consistent with page 67, Article 111, the Public Service Commission. It says in Sub-section (2):

"The Public Service Commission shall consist of a chairperson and no less than three or more than six other persons nominated by the President and appointed by the National Assembly."

So, what I was proposing, with respect to the other positions, including this one, is in line with this type of recommendation here. That is why I say, to have uniform-

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diate appointments and then maybe as leaders sort out also the permanent appointments.

MR STABY: Mr Chairman, the difficulty which we have, and which is at the root of the entire discussion, is the fact that under paragraph (aa) the prime minister, and (bb), the ministers and deputy ministers, we find that these are clearly political appointments. If there is a change of government after an election, irrespective of whether there is a change of government or not, some of the prime ministers, ministers and deputy ministers can be exchanged, can be dismissed, and that is not necessarily the case with the chief of the defence force and the inspector general of police. I don't believe it should be the case. That is where we run into trouble. The one group of appointments is clearly political and the other should equally clearly be non-political appointments. That is where I have a problem.

I am not quite convinced that we need to appoint a body called the Security Service Commission in order to have somebody recommend to the president who should be appointed to those two positions. I tend to think that the Civil Service Commission could, provided that proper legislation is on hand, actually do the job.

I have a lot of sympathy for the honourable member Angula's suggestion that consultations take place, but consultations are based on trust. I believe that control is better, and I think that whereas we are writing the Constitution for the next fifty years, we might as well solve this problem now.

I would therefore suggest, Mr Chairman, that a clear distinction be made between the political appointments, such as members of the cabinet and the equally clearly non-political appointments, such as the chief of the defence force and the inspector general of the police, and that the mechanism be established on how these people are appointed and fired, discharged, and I would suggest that we make use of the Civil Service Commission for this purpose, that we have a good look at the powers and the functions of the Civil Service Commission, whether this is in fact possible, and if it is possible, that we provide via an act of parliament for this procedure to take place. Thank you.

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MR BARNES: Mr Chairman, I have listened to the submissions of my honourable colleague, Mr Staby, and also certain members on the other side of the House. I am still of the opinion that the proposal made by the honourable member Mr Katjiuongua does solve the problem. I am ad idem, Mr Chairman, that there should be distinction or there should be clear lines of division between political appointments and the non-political appointments, and I do not want to repeat what my colleague said.

The idea of a commission for security services is a very good suggestion and I would support it. The most important thing that we seem to miss in this discussion on this particular clause on these two senior appointments, are that we are actually trying to protect our president and our future presidents.

I get the impression, with due respect, that most of the time we are looking at the Constitution and trying to build the Constitution around the personality or an individual or along party-lines. I want, with all due respect, to again appeal that this Constitution will be our Constitution. This country is our country, and therefore if we can add anything that can improve the good running of the government, we should not view it with the idea that we will be taking away certain powers which we envisage for ourselves.

Mr Chairman, on these two appointments, if the members on the other side of the House will agree that in the transitional arrangements provisions can be made that in the absence of the National Council these appointments of the chief of defence force, the inspector general of police can only be effected with a two-thirds majority approval of parliament for the transitional first appointments, we will accept such a ruling. It gives added protection, it gives added peace of mind and I don't think there is any member here today that would allow anything that is an improvement to be thrown aside just because we are thinking along party-lines or political lines or personality lines.

I would like to appeal, Mr Chairman, that we make provisions in the absence of the second house, that these appointments be approved with a two-thirds majority by the single house that we will have initially, because it is important that even the first president and presidents to follow must be protected, and if we then make provisions for a security commission for the future, I have no problems with that.

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MR BARNES

May I just make mention of another important aspect, and that is, unless we are going to accommodate each other's fears and the fears of our supporters and the mistrust, we will not succeed in bringing about a constitution that will be accepted by the majority of the people, and therefore, I appeal, let's look at this Constitution objectively with the intention of bringing about those things which will annul fears and which will contribute to national harmony and mutual trust.

I therefore support the submission and proposal by Mr Katjiuongua with the amendment that if special arrangements are made for the first appointments in the transitional schedules, we will accept that, but that serious consideration be given to a commission which will in future make the recommendations.

Another point I would like to conclude with: We accept, gentlemen, that the appointments must be made by the president. There is no dispute on that matter. We accept that we cannot create a president that is going to be just another rubberstamp. I wouldn't like to have a president like that. But there must, for the interim period, be controls and in future, for future presidents there must also be controls. That does not deny us the right to let the executive do the appointments, we are ad idem on that point without any doubt. But let's be realistic and let's accommodate that in the spirit of give and take.

MR MUDGE: On a point of order. I want to propose that the meeting adjourns until 14h15 to allow the parties to caucus on this matter and see if we cannot come with a concrete proposal.

BUSINESS SUSPENDED and RESUMED AT 14h15.

MR RUKORO: Mr Chairman, after consultations with some of the party leaders, I think I will defer to Mr de Wet, who I suspect has a proposal which could become a basis for compromise.

MR DE WET: Mr Chairman, having listened very carefully to all the arguments that was raised by the honourable members, I came to the conclusion that we can find each other on this point.

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I think in the first instance we all agree that appointments of this nature cannot be debated in parliament, because that means a public debate, and I think it will cause great embarrassment for those people involved, even for parliament as such, and it would definitely not be in public interest to do so. Therefore I think it is not responsible to come forward with such a suggestion.

I think in the first instance we must adopt the fact, as has been raised by honourable member Mr Staby, that we have to do with political appointments and with non-political appointments, and secondly, adopt the principle that as far as political appointments are concerned, it is the prerogative of the president to do those appointments. He can consult with whom he wishes, and I would say the prime minister, ministers and deputy ministers fall under that category.

Then we must make a clear division between those which can be categorised as subject to recommendations by the Judicial Service Commission, and then those subject to recommendation by the Public Service Commission. But we do have a problem: Do we regard the chief of the defence force and the inspector general of police as being subject to recommendations either by the Judicial Service Commission or the Public Service Commission? I think we must appoint another commission - let's call it the Security Force Commission - which can be appointed the same as the Public Service Commission. That means that the Public Service Commission, in this case the Security Force Commission, shall consist of a chairperson and not less than three and not more than six other persons nominated by the president and appointed by the National Assembly by resolution. Then, in doing so, we can look at all the appointments.

The second problem I have is that of the attorney general. Shall we regard the attorney general as a political appointment or an appointment subject to the recommendation of the Judicial Service Commission? I'm not very clear on that, I don't know what the House regards the appointment of the attorney general to be.

I would suggest that the attorney general falls under the category, "subject to the Judicial Service Commission", and then also under that category, the prosecutor general, Article 87.

So, what I suggest is that under the heading, "Political Appointments", we have the prime minister, ministers and deputy ministers, and under the heading "to appoint on the

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recommendation of the Judicial Service Commission", the attorney general, chief justice, judge president, the other judges of the Supreme Court and High Court, the ombudsman and the prosecutor general. "Appoint on the recommendation of the Public Service Commisison", the auditor general, the governor and deputy governor of the central bank and then under Security Force Commission, the chief of the defence force, inspector general of police.

MR KATJIUONGUA: Mr Chairman, I have listened very carefully to what my brothers, honourable Mr Angula and Dr Tjitendero said, and more particularly to what my dear brother, double H, Mr Hidipo Hamutenya, said, and I want to assure them that I have listened with great consideration, and I really want to prove, if I have to do that, that sometimes when we talk about these things, the impression is conveyed and sometimes insinuations are made that people want to undermine the Swapo-government, people are sort of a bit sour because they are not in the cabinet or they have not been invited to join and things like that. This has been said on a few occasions.

I want to assure you that I don't have the slightest intention to sabotage a democratically elected government. Equally, I am a proud man and I have no intention to hitch-hike on the victory of others. I wish them goodwill and that things will go well. I think I have my integrity and my independence. Those things for me are crucially important.

Now, as a compromise, having listened to my three brothers, and I am very, very much aware of the fact that the honourable Mr Angula and my sister here, very often in the committee we shouted at each other, I think we are all a bit short- or high-tempered, whatever they call it, but we remained friends, we all smiled afterwards.

My compromise - and I disagree with honourable Mr de Wet about the secrecy, that the hearings are bad. I disagree with you, these things are done elsewhere in the world and there are absolutely no irresponsibilities involved. I think we can do it this way, we say the proposal I made will stand for the long term, not the first five years. For the present, the next five years, we agree on some kind of transitional arrangement by which, respecting the spirit, not the letter, but the spirit of what stands in the permanent Constitution, these very important and sensitive appointments will be done in this way. As my

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brother Mr Hamutenya said, the issue of consultation was crucial in this process, so I propose that these appointments, especially the ones on defence and police, could be discussed. He said we could create a security committee. I think what we can do, we can have a standing committee of the National Assembly on foreign affairs and security, where all the parties are represented, and then with the president or whoever he appoints, we could discuss these things in camera on one principle, consensus, that we are not going to vote in that committee on these appointments. The consensus is the majority feeling that these things should go through, that all of us have had a discussion and then confirmation by parliament in the first transitional period will be a mere formality. There will be no debate on these things.

So, in that sense these appointments, within the spirit of the Constitution, in the first five years don't have to go through that process that I recommended. Then it can be taken as a separate situation.

Therefore I think we can have these other things stand as they are for the long term, but for the transitional arrangements the chief justice will come before a standing committee on justice and that will be a legal forum where members can sit and talk about these things. Then all of us are satisfied that maybe this is one way of getting these things through. Then I don't think anybody is going to veto or sabotage or maybe have a public hearing at this stage. Maybe we can do it that way. I think we will be able to kill two birds with one stone. One, we will be acting within the spirit of the Constitution, which is a long term thing, and at the same time we will take account of the realities that we face now as we go ahead.

I understand that, for example, many friends here might think that "you have people already in these institutions, appointments and promotions have been made already", and many people feel that the system might not change at all if we keep it this way. I have understanding for that, because people want to feel that independence also means change. There is a point in that, I agree with that. But I think there is also understanding for those of us who feel that changes should be made, but in some of these things which are of crucial importance we should all be satisfied, that change takes all of us into account where these things are made. That is my proposal. Thank you.

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MR MUDGE: Mr Chairman, the DTA discussed this problem over the lunch-hour. We did not meet our colleagues over there, but we had our own caucus-meeting, and independently from them we have decided to reaffirm our view that we are not in favour of appointments being discussed in the National Assembly. It was our position in the committee and it was also our position when we came to the Assembly. But we do agree with the proposals made - and these proposals are very similar - by the honourable member Mr Hamutenya and honourable member De Wet, namely that we should divide these appointments into three categories and I want to repeat that so that we can compare and see whether there is consensus.

We agree that the appointment of people in political positions is the prerogative of the president, that he can do that on his own. I don't think we want to appoint ministers and deputy ministers and other political office-bearers.

When it comes to the people in the administration of justice, we do agree with the proposal made by Mr de Wet that those people should be appointed by the president on the recommendation of the Judicial Service Commission. So I think there is no difference of opinion.

We also agree that the other people in the administration who are not political appointees should be appointed by the president on the recommendation of the Public Service Commission, and we also welcomed the proposal by the honourable member Mr Hamutenya that we could create a third commission, appointed by resolution of this House, who could advise the president on the appointment of people in the police and the defence force.

Mr Chairman, then lastly, the honourable member made a suggestion, and I think this is where it appears as if there might be a misunderstanding, and I think we should have absolute clarity on that. I welcomed the idea of the honourable member Mr Hamutenya that seeing that this new commission will probably not exist from day one onwards, it will not be there on day one, that for the time-being the first appointments in the senior positions referred to should be done in consultation with the opposition parties. We very much appreciate the gesture coming from the side of the honourable member.

But the one thing which remains to be decided - and I am not sure about that - is how will this commission in future be composed? Mr de Wet made some suggestions, Mr Katjiuongua had some ideas and it is just possible that we

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should, as far as the appointment or composition of that commission is concerned, compare notes to see whether it should be composed of members coming from parties or whether it should be members nominated by parliament or whatever. I get the impression that there is not absolute consensus on this last point.

Mr Chairman, now it is for you to decide whether there is enough consensus as far as this matter is concerned and whether the legal advisers will be able to continue drafting something more or less along these lines.

MR MWESHIHANGE: Honourable Chairman, honourable members of the Constituent Assembly, I simply wish to point out the inconsistency that is created by the heading of Article 117. Whereas Sub-paragraph (1) talks of chief of defence force, the heading talks of commanding-general.

Secondly, there is also confusion created by the title of the rank commander-general. I believe the normal and, indeed, the conventional title of a head of a defence force, is the chief of defence force. It is my humble submission, Mr Chairman, that in order to avoid confusion and in order not to be out of tune with military practice the world over, the heading of this title should be changed to read "chief of defence force" and not "commanding-general."

CHAIRMAN: You are way ahead of us. We are on Article 32.

Honourable members, we have what seems like consensus here, that there will be about four types of appointments: Political appointments - ministers, deputy ministers, etc, would be appointed by the president because these are really his assistants, advisers. So these the president will have the prerogative to appoint without consulting anybody, but I hope he will consult somebody, these things we do not do alone.

The second type of appointments will be those dealing with administration of justice. That will include the attorney-general, chief justice, judge president of the High Court and other judges of the Supreme Court and High Court on recommendation of the Judicial Service Commission.

Then there are others which look like civil service appointments, people who run the system. They could be

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think these are very elementary things and if we disagree, we disagree and the House can continue, that's all.

ARTICLE 32 AGREED TO.

ARTICLES 34 - 35 PUT AND AGREED TO.

ARTICLE 35 PUT.

MR SISEHO: Thank you, Mr Chairman. I think we have a very minor addition to sub-clause (1). It reads:

"The Cabinet shall consist of the President, a Prime Minister and such other Ministers as the President may appoint.."

but we would like to definitely identify or define the size of the Cabinet. For example, the Cabinet shall consist of, say, twelve members or twenty members, whatever the case may be. But here it appears very loose. The size of the cabinet should be defined. Thank you.

CHAIRMAN: It was said earlier under the first category of appointments that the political appointments will be left to the president and under that the ministers were mentioned. That still stands.

MR MUDGE: Mr Chairman, I think it is the prerogative again of the president to appoint his cabinet, to decide how many people he wants in his cabinet. He will have to explain to the voters what he has decided and why he needs so many people, I don't think we should interfere there. But seeing that we are not dictating to the president in any way how he should compose his cabinet, I think it is wrong to specifically make provision under this subparagraph for the appointment of certain persons in the cabinet. I think it should just be deleted, because frankly, we do not agree that those people should be in the cabinet, but he can appoint them in their personal capacities. But that is not our decision, it should not be in the Constitution.

MR KAURA: Mr Chairman, in view of the fact that we accept the fact that the attorney-general is a civil servant to

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be recommended by the Judicial Service Commission to the president, then that person does not qualify to be a member of the cabinet, because he will be a civil servant and then I thought the deputy ministers are not members of the cabinet, the cabinet consists only of ministers. So, my feeling is that this sentence, beginning with "provided that the President may also include in the Cabinet any Deputy Minister appointed under Article 37 hereof, the Attorney-General and the Director of Planning" should be excluded, because these people are civil servants. The deputy ministers are not members of the cabinet and the attorney-general, they must be excluded.

MR ANGULA: Mr Chairman, I have no problem with leaving that section that has been provided, on the understanding that the president will have the right to call anybody in the cabinet whoever he elects to consult. We should not take it out that it will prohibit the president to do so. The president as the chief of the executive should have the right to call in any person into the cabinet to advise him.

MR KAURA: Mr Chairman, that is well understood. The president can call any secretary of a department, anybody, to the cabinet for consultations, but it does not mean those people are members of the cabinet. So, consequently, if you include it here in the Constitution, it would appear as if they are members of the cabinet, while they are in essence not members of the cabinet at all. But on special occasions they can be called in, but they cannot be included in the Constitution.

MR ANGULA: I think there is confusion here. I thought what Mr Mudge said is that the decision whether these people should be members of the cabinet should be left to the president and not be made part of the Constitution. That I agree with. But I don't agree with honourable Mr Kaura that they should not be, and that is the point I wanted to clarify that if the president so wishes, they can be.

CHAIRMAN: I think Mr Mudge was replying to Mr Siseho's

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statement about the size of the cabinet, that the president has the prerogative under the first category of appointments to appoint, but if he makes a big cabinet he has to answer to the electorate.

The other question is about the deputy ministers and the attorney-general, that they shouldn't be mentioned in the Constitution as part of the cabinet, but the president can invite them and anybody to sit in the cabinet because he wants them to advise him. That has not been disputed, has it? Agreed.

MR MUDGE: On a point of order. Just to make sure that we do not make a mistake, it could have serious consequences. In the proposal made, Mr de Wet referred to the attorney-general on the previous page. Isn't that supposed to be the prosecutor-general, who is actually the civil servant? Isn't the attorney-general in fact a political appointment?

CHAIRMAN: That is right.

ARTICLE 35 AGREED TO.

ARTICLE 36 PUT.

MR KATJIUONGUA: Mr Chairman, the issue of functions of the prime minister is very sensitive and unfortunately our president-designate is here, so I don't want this poor fellow, whoever it might be, a brother or sister, to be crucified.

When we discussed this issue in the committee, this position was seen to be very important. Mr Tjiriange said some things about the importance of the position and my position was the following:

"With the appointment of the prime minister my position will depend on how we elect the president, whether the president will be elected out of the House or in the House, then I will make clear my position on the prime minister."

Now I think it is very clear that the president will be elected and then he will not remain in the House, he will be elsewhere in Namibia House or State House. Let us not assume that the president and the prime minister will always come from the same party. The way we are going to elect the people in the future, after the next five years, will be different. So, therefore we should not limit too

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much the functions of the prime minister, but at the same time, maybe we should not go at this stage into too much detail.

The other day I said maybe the House can have a look at the catalogue of the powers of the prime minister in the French Constitution, but I would like to make just a small, tiny amendment to the position of the PM, and I want this section to read as follows, and please listen very carefully, I am not attempting to make the prime minister a competitor with the president, not at all, that is not the intention. I simply sort of complement him and especially in the situation where the two of them may not come from the same political party. It reads as follows:

"The Prime Minister shall be the leader of government business in parliament"

and then the rest of the story we have here -

"and shall co-ordinate the work of the Cabinet and to advise and assist the president in the execution of the function of government."

He is not simply a bureaucrat, he is not simply an administrator, per se, but he is the leader of government business, I think in the same way that they have in Zambia. The prime minister is the leader of government business in parliament, but, of course, working under the overall supremacy of the president. That is my modification.

MR HAMUTENYA: Just one question I would like to get clear. The honourable member of the House said that the prime minister and the president may not always come from the same party, I agree with that, but the formulation that we have here now is that the prime minister will always be appointed by the president. Whether he is from another party or his own party, the fact remains that he will be appointed by the president, especially as his chief assistant among other ministers.

That being the case, I am sure if we have agreed that the prime minister automatically becomes the speaker of the House. If that is not the case....

MR KATJIUONGUA: No, he is the leader of all the other ministers...

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MR M GAROËB: Mr Chairman, I just want my dear brother, my former fellow-exile, otherwise known as Tom Mukwandja ... LAUGHTER ... to clarify what he really means by leader of government business. I ask this because there are some historical presidents, particularly in the former British colonies, and I do recall the time when him and me were in East Africa, Dar-es-Salaam. A minority government was formed in Kenya by a then known organisation known as Katu, and then the leader of that minority government, in the absence of a majority government, was being referred to as the leader of government business. The British coined these things. In that sense it does not make any sense to me why the prime minister should be called leader of government business, because in any case he is the first among the ministers of the government. Maybe you can clarify precisely what you mean by that.

MR KATJIUONGUA: Mr Chairman, these names like Tom Mukandjwa we mention in the cafeteria, not in the Assembly.

I think in essence we are talking about the same thing and I don't want to create a problem. All I am trying to say, in our terms of parliamentary procedure a person becomes the leader of the government if he is the leader of a coalition or the party that the majority of parliament accepts as the leader of the government for the time-being. I don't want to go into the story of Katu and the British Empire, but if you simply say the prime minister is the assistant to the president, that's all, in a sense he becomes an appendix, he is not somebody in the Assembly, in his right as prime minister. The link is there, he will advise and assist the president, that must remain because there is a link there, but I think when he is in parliament he is the first man in parliament, he is the leader of the governing party business in parliament. He is the spokesman, in fact, of the president in parliament, all these things.

So, I want his status to be seen in a little broader context than simply a proxy, an extended arm of the president in parliament. That is why I want to say he is the leader of government business, he runs the business of all the ministers of his party and he is spokesman of the party number one in parliament and also for the president in parliament. That is all I am trying to say. I am not insisting, maybe after some time we can amend the constitution when this story is over, but I am just trying to point that out.

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MR KOZONGUIZI: Mr Chairman, I do not think we should really spend a lot of time on this. There is nothing wrong in the proposal, but just a little explanation.

Leader of government business: In the British Parliament the leader of government business is another cabinet member who is not the prime minister. Generally the prime minister would appoint one of his ministers as the leader of government business, conducting government business. He is the man who would talk about arrangements and the programme of parliament, when they are going to meet and such matters.. But it did happen that in Ghana, when it was still the Gold Coast, i.e. before it became Ghana, Kwame Nkrumah did become what you would call a prime minister, but he was not called a prime minister. It was then that he was called Leader of Government Business. That was before independence.

Whilst I would have no problem with describing the prime minister here as the Leader of Government Business, I would say that we seem not to have any precedent in that.

CHAIRMAN: The proposal is that it stays as it is.

ARTICLE 36 AGREED TO.

ARTICLE 37 PUT.

MRS ITHANA: Honourable Chairman, I have difficulties with this Article 37, the logical sequence of its placement shortly after the function of the prime minister. I thought this article could be moved to after Article 40, after the duties and functions of the cabinet.

Secondly, I don't recall the committee deciding that deputy ministers should necessarily be members of the National Assembly. Maybe my recollection is failing me.

CHAIRMAN: On the first point you are definitely right, because some of the ministers do not come from the Assembly, so why should the deputies be required to come from there? It is a mistake by the lawyers, I think.

MR MUDGE: What we decided in the committee was that they need not be one of the elected members, they can also be

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one of the nominated members. In that sense they do not come directly from the Assembly, but after having been appointed as members. If you consult the minutes, you will find that that was very clearly stated in the committee.

MR ANGULA: I don't remember exactly what we decided, but I am very much in sympathy with what my elder sister has said there.

To be systematic and a bit coherent, since we say that deputy ministers do not necessarily become cabinet members, in this case perhaps there is no need for them to necessarily be members of the National Assembly, but if the National Assembly wants them to be there to answer to a particular thing, like in the issue of accountability, then they should be allowed to be there to defend themselves or to make a report if so required, but not necessarily that they should be members.

MR BARNES: Mr Chairman, I was the one in the committee that consistently made mention of the six members, and it was agreed in the committee that all members of the cabinet will be elected from the National Assembly which included the six and nothing additional to the six. Perhaps we can consult the minutes on that for clarification, the minutes of the standing committee.

DR TJIRIANGE: I think the honourable member who has just spoken is correct, but since the deputy ministers are not members of the cabinet, they don't need to be members of the National Assembly, so there is no problem. Then we can go ahead. INTERJECTION. No, but he is talking about the members of the cabinet. He is saying that the ministers, according to him, should come from the National Assembly because they are members of the cabinet, but the deputy ministers are not members of the cabinet, so there is no problem, there is no need for them to come from the National Assembly.

MR KATJIUONGUA: Mr Chairman, I feel happy, this is not my problem, it is your problem, solve it please. Thank you.

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MR KAURA: Mr Chairman, if we look at page 30 at the top, (c), the powers of the president:

"can appoint as members of the National Assembly but without any vote therein, not more than six persons by virtue of their special expertise, status, skills or experience."

These are the only people the president can appoint outside the members of the National Assembly, and after he has appointed the additional six, they become members of the National Assembly, and these are the only people the president can elect to become deputy ministers. So, they will first have to be members of the National Assembly before they can become deputy ministers and they are only six. So, this line is correct as it stands.

MRS ITHANA: Thank you honourable Chairman, I think we are confusing matters. I cannot see where it is mentioned, the relationship between the cabinet and the six appointees and the National Assembly. What was decided clearly that I can recall is that members of the cabinet should be drawn from the members of the National Assembly.

MR MUDGE: Side-bet?

MRS ITHANA: And then following from that, the deputies are not members of the cabinet and therefore it follows logically that they are not necessarily supposed to come from the National Assembly. Those who are already members of the National Assembly, well and good, but those who are not members of the Assembly and they are deputies, they are not supposed to be made members of the National Assembly.

CHAIRMAN: What I recall is that we said we should keep in mind that if these six are going to be appointed to the Assembly, and if the president wants to appoint a minister from outside, it must be from among those six. But it implies that they shouldn't come from the Assembly, other ministers. You are saying that all the ministers must be drawn from the National Assembly? Is that the decision?

MR ANGULA: On a point of order. That argument cannot hold if Article 35(1) is only amended to the extent that

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you take out the attorney-general. If you only take out the attorney-general and leave it as it is, then your argument holds, but if you amend it, as it happened, then there is no need for the deputy minister to necessarily be from the National Assembly. So, you can choose between the two. If you want to amend that article as it has been amended, then the argument of honourable Ithana is correct, but if you amend that article only to take out the attorney-general, I think he is not a civil servant, you leave it, then of course there is a need for these people to come from the National Assembly because there is a possibility that they become members of the cabinet. I think it is clear, we should be systematic.

MR KOZONGUIZI: Mr Chairman, I think now that we have the minutes coming that could solve the problem, because I really see this as a matter of what was decided in the committee. It is a question of the minutes, because it seems that the members of the committee differ on this point as to what was said there.

MR RUPPEL: Mr Speaker, just on the previous speaker's note regarding the availability of the minutes of the standing committee, I think the status of the minutes is not clear. I would have thought that they are confidential. Thank you.

CHAIRMAN: Are the minutes confidential to the Assembly or to the public? I want to make this clear. The committee is a committee of the Assembly and for the minutes to be confidential to the mother-body doesn't make sense, unless we are talking about strangers. But the chairman can summarise what he thinks the minutes are saying.

MR KOZONGUIZI: On what the honourable Mr Ruppel has said, if the minutes were actually confidential, they could not be confidential to the Chairman and I trust that the Chairman will check and give us the correct position in the minutes.

CHAIRMAN: As Chairman I do not think that the minutes are confidential to the Assembly, because the committee was the child of the Assembly. But the Chairman has a good memory, he will, after consulting his memory, give you the answer.

ARTICLE 38 PUT.

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MR KAURA: Mr Chairman, as long as this point is in dispute, whether a deputy minister is a member of the Assembly or not or shouldn't be, then I feel he has absolutely no obligation as a deputy minister to take an oath of office. How can he take an oath of office if he is not a member of the National Assembly? To whom is he taking the oath if he is not a public servant? He is not taking it in the interest of the public, so he shouldn't take any oath.

CHAIRMAN: All the members take the oath, not only the members of the Assembly. Everybody who is appointed takes the oath.

ARTICLE 38 AGREED TO.

ARTICLES 39 - 43 PUT AND AGREED TO.

ARTICLE 44 PUT.

MR KATJIUONGUA: Mr Chairman, I think this is simply an omission. We said Article 44 should read like the same article on the National Council. Instead of legislative power we should simply say the National Assembly, because in the other section we say the National Council. Parliament means both.

CHAIRMAN: The top heading is "Parliament", which consists of two houses, the National Assembly and the National Council. That is the parliament. Therefore the heading of Article 44 will say "National Assembly" instead of "Legislative Power."

ARTICLE 44 AGREED TO.

ARTICLES 45 - 48 AGREED TO.

ARTICLE 49 PUT.

MR ANGULA: I asked the floor to express my reservations on this article. I believe that this article deprives the Namibian people of the opportunity to elect their law-makers directly. The Namibian people are required to vote for puppets rather than for legislators, and people will be here on the basis of their party list. I believe in this way we have actually severed the link between the people and their law-makers, the link that should exist between the parties and the people out there, and when party leaders go to the people they are likely to talk

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about their parties, they are not likely to talk about national issues seen from the point of view of the law-makers. So, personally I am very disappointed that we have actually opted for this type of procedure of electing the law-makers. I would have liked that the law-makers be directly elected by the people on the constituency basis, so that they are directly responsible to those constituencies. Thank you.

CHAIRMAN: With that reservation, is it agreed?

ARTICLE 49 AGREED TO.

ARTICLE 50 - 56 PUT AND AGREED TO.

ARTICLE 57 PUT.

MR MUDGE: Mr Chairman, I think there is a serious misunderstanding as far as Sub-article 57(1) is concerned, and we would like to draw the attention of the lawyers to that.

If you read Article 32(3), the one refers to the other and vice versa. Article 32(2)(a) provides for the following:

"The President shall have the power to dissolve the National Assembly by proclamation in the circumstances provided for in Article 57, or if the government is unable to govern effectively."

When you read 57(1), it reads as follows:

"The National Assembly may be dissolved by the President under Article 32(3)(a) and shall be dissolved if the President is advised to do so by the Prime Minister acting on the concurrence of the majority of the Cabinet."

What I think should be the formulation is the following, that in 32(2)(a) the president shall have the power to dissolve the National Assembly by proclamation in the circumstances provided for in Article 57(1), and the rest of the paragraph should go over to 57, which shall then clearly describe how and under what circumstances the president will be empowered to dissolve the government. But as it stands now, it is very confusing.

What I would want to know - the rest is a matter for formulation - the principle I want to clarify is the following: If the country becomes ungovernable, the president

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may dissolve the government and he shall dissolve it if he is advised by the prime minister. Now, when does the prime minister advise him? After the country has become ungovernable or could the cabinet at any time decide to dissolve the government? I appeal to my colleagues to refresh my memory here, I can't exactly remember. But something is wrong here, I must say that. Somewhere along the line there is definitely some confusion.

CHAIRMAN: Could we just refer this to the lawyers to cross-check? Agreed.

ARTICLE 58 - 60 PUT AND AGREED TO.

ARTICLE 61 PUT.

MR MUDGE: Mr Chairman, I just want to remind you of the remark I made as far as Article 61(3)(a), the sessions of the National Assembly, are concerned, where I said that the Assembly itself should also be allowed to determine not only the hours, but also the date on which the Assembly shall meet.

CHAIRMAN: Any objection to that? Agreed.

ARTICLE 61 AGREED TO.

ARTICLE 62 PUT.

MR RUKORO: Mr Chairman, Article 62(2)(f), the third line where it says:

"... any senior official thereof to appear before"

and then I think we delete the words "the National Assembly", so that it reads "appear before any of the committees of the Assembly."

MR MUDGE: Mr Chairman, in this paragraph we refer to parastatal public enterprises. In another paragraph we have referred to public corporations. Could we just ask the lawyers, when they finally draft the document, that they should always use the words "parastatal public enterprises", then we know exactly what we are talking about. Otherwise it could be confused with public companies.

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MR KATJIUONGUA: Mr Chairman, for the sake of consistency, when we are talking about the powers of the president to declare martial law and, if necessary, a state of national defence, then we said he must report to parliament and get its approval within 14 days. I think, therefore, it means we must add a (k) here which reflects the same position as well. Then it is consistent, then it is also one of the functions of the Assembly to approve or reject a declaration of a state of national defence by the president within 14 days, just to link the two together. That is all I am saying.

MR ANGULA: Honourable Chairman, I think that concern is taken care of in (j). There are a number of articles in the Constitution which requires the parliament to do a number of things, like Article 29(2) on impeachment, unless we want to put it also there. Another one is 92 on review and reversal. So those things are taken care of by (j) and I don't know why we have to add them here.

MR KATJIUONGUA: We have agreed already. You raised the same argument when we were talking about the president having to report and then with the intervention of our foreign minister-designate, we agreed that subsequently, after the action has been taken, there must be a report which involves approval or rejection. There we agreed. So, I am trying to say that it is just to indicate that it is one of the functions of the National Assembly because it is not contained in this list of functions. That is all I am trying to say. So I don't see where the contradiction comes in.

CHAIRMAN: Is there any objection to that?

DR TJITENDERO: Inasmuch as I would agree this one is a function of the National Assembly, the other one is a function of the president reporting. If we put it here, it will appear as if the National Assembly is the one that must take action. The action on this side is to be taken by the president and the National Assembly is the recipient. As it stands now it is quite appropriate, these are two actions taken by different organs of the State.

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MR KATJIUONGUA: This thing works two ways, that is the whole way of the separation of powers. The president must report, it is an obligation, because he knows parliament wants a report and to give that report is his function. It is all I am trying to say.

MR RUPPEL: I just want to deal briefly with the argument of the honourable Mr Katjiuongua. He now raises the same argument as has been raised by members of the ACN about rights. He says if there is a right somewhere, there must be a responsibility on some other side. Somehow structurally it doesn't make sense. In this document we have provided for certain functions under this Constitution, and here we say in (j) these functions must also be exercised in tandem with wherever they are provided for by the legislature. So, it is quite clear and it doesn't require any additions. We are loading this Constitution with unnecessary things and it is going to become very heavy.

BUSINESS SUSPENDED AT 15h40 and RESUMED AT 16h00

CHAIRMAN: Honourable members, we were debating an issue which we have agreed upon. One member said we must be consistent and others said it is covered, so we aren't losing anything. So, I think there will be no harm in putting (k) there and adding what the honourable member requires.

ARTICLE 62 AGREED TO.

ARTICLE 63 - 66 PUT AND AGREED TO.

ARTICLE 67 PUT.

PROF KERINA: Mr Chairman, could we add twelve months from the date of independence so that these matters can be handled before the expiration of five years?

"There shall be a National Council which shall be established in terms of this Constitution within twelve months from the date of independence."

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MRS ITHANA: I have no objection to the proposal, but I am just thinking about the practicality of establishing that house within twelve months, in view of the quantity of plans that are supposed to be carried out before this house is established.

PROF KERINA: Mr Chairman, I am being reminded that the agreement was two years. I am satisfied with that.

MR RUKORO: The agreement was that all these matters relating to time-frames were supposed to be contained either in the Schedule or as part of the transitional provisions. So that particular clause, embodying the agreement we made in the committee, relating to the establishment of the National Council, i.e. not later than two years, should be specifically stated either in the transitional provisions or in the Schedule and the same with municipal councils which, I think, was twelve months and delimitation commission six months, etc.

MR RUPPEL: Honourable Mr Chairman, I think the formulation as it stands now is not quite correct.

"The National Council should be established by Act of Parliament and subject to this Constitution",

not "in terms of this Constitution". It doesn't really make sense. All the details will be in an act of parliament, but it must comply with whatever we put in here as the basics.

MR KATJIUONGUA: Mr Chairman, we said the National Council will be an elected body by the people just like this House. So, therefore it won't be established by a separate act of parliament, it will be established in terms of this Constitution. That is the agreement.

CHAIRMAN: It stands as it is.

ARTICLE 67 AGREED TO.

ARTICLE 68 PUT.

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PROF KERINA: Mr Chairman, Article 68(1):

"The National Council shall consist of two members from each region referred to in Article 101 hereof, to be elected from amongst their members by the Regional Councils for such region."

I would have preferred it to end:

"... to be elected from the regions",

the problem being that we are likely to end up with two elected members of the councils becoming members of the National Council, and then when we have scheduled meetings on the same dates, I wonder whether these members will be sitting in the National Council or will be sitting in the Regional Council?

MR ANGULA: Just a clarification. My understanding is that first and foremost, of course, you have to be a member of the Regional Council in your particular region. The Regional Council will constitute itself in an electoral college. From amongst its members it will elect two people. Once elected they become members of the National Council and they are not members of the Regional Council. That was my understanding.

ARTICLE 68 AGREED TO.

ARTICLE 69 - 70 PUT.

ARTICLE 71 PUT.

MR RUKORO: In the middle of the second line, after "local authority", we need to insert "other than a Regional Council,". The sentence should read:

"No person shall be qualified to be a member of the National Council if he or she is an elected member of a local authority other than a Regional Council..."

CHAIRMAN: Agreed.

ARTICLE 71 AGREED TO.

ARTICLE 72 PUT AND AGREED TO.

ARTICLE 73 PUT.

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MR KATJIUONGUA: If my memory serves me well, Mr Chairman, on a reminder by Mr Rukoro, we agreed to add a paragraph (d) here: "to initiate legislation on matters of regional concern."

CHAIRMAN: It will be (c) and the present (c) will become (d).

MR ANGULA: I agree that they should have a say in regional matters, but what will be the order? They initiate legislation, do they send it first to the National Assembly or do they debate it, agree and send it, or what will be the order?

MR KATJIUONGUA: They pass it, make recommendations and send it to the National Assembly. The National Assembly must go through it as well.

CHAIRMAN: That is very clear.

ARTICLE 73 AGREED TO.

ARTICLE 74 PUT.

PROF KERINA: Article 74(4)(b): Mr Chairman, I am a little bit concerned, if and when the principle is affected. Shouldn't it be referred to the National Council also and then back again, in the event that the principle of the bill is affected?

MR MUDGE: Mr Chairman, I do not want to repeat what the honourable member has said, but I also have a problem in paragraph (c) and I will try to explain very briefly.

If an amendment is proposed by the National Council, which will only affect one of the clauses in the proposed bill, it goes back to the National Assembly and the Assembly can then amend that particular clause and the bill need not go to the Council again. But should the principle be affected, as the honourable member has said, and the National Assembly changes the principle, then it really amounts to a new bill. In that case we feel that it must go to the National Council for consideration. Only in the case where the principle is amended, which actually means that it will be a new bill, because you can't have an old

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bill with a new principle. Can the lawyers have a look at that please? I don't think any member can have a problem with that.

CHAIRMAN: What is not clear in (c)

MR MUDGE: They say that in the event the National Assembly will be required to reconsider the principle of the bill, not an amendment of the bill, the principle of the bill, and then it continues, "upon such reconsideration the National Assembly reaffirms the principle of the bill by a majority of two-thirds of all its members entitled to vote, the bill shall be dealt with under Article 56. If such two-thirds majority is not obtained in the National Assembly, the bill shall lapse." But Sir, it is possible that the National Assembly might change the principle, might come with a new bill to achieve the same objective, I think that is possible, because they would not have come with a bill originally. I was just thinking that maybe we should make provision for that.

But because I am not hundred percent sure, that is why I ask whether the lawyers can have a look at that, if it is possible to bring that principle in.

MR GURIRAB: I don't know whether I have the same problem. I am more familiar with the language of questions being either questions of substance or of procedure. I don't know what the principle of the bill exactly means. I need some clarification.

CHAIRMAN: If the Council had strong views and therefore wanted the bill to be reconsidered by the National Assembly, and when they reject the bill it must be done by two-thirds. We are using the common language. Is it the same thing here, this principle?

MR MUDGE: I will not continue with the argument, I will do my own research.

CHAIRMAN: Paragraph (c) - agreed.

ARTICLE 74 AGREED TO.

ARTICLE 75 - 76 PUT AND AGREED TO.

ARTICLE 77 PUT.

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MRS ITHANA: Maybe there is an omission in the second line of paragraph (4): "... which vested in the Supreme.." I think it should be "Supreme Court."

MR NUJOMA: Comrade Chairman and honourable members, here we are talking about Namibia, and Article 77(4) is talking about the "Supreme Court of South West Africa." Why not the Supreme Court of Namibia?

CHAIRMAN: It was just a misunderstanding.

ARTICLE 77 AGREED TO.

ARTICLE 78 PUT AND AGREED TO.

ARTICLE 79 PUT.

MR KAURA: I have a question on paragraph (2) to you, Mr Chairman.

In view of the fact that we have been subjected to colonialism, and during all these years of colonialism there was of course a lack of recognition for the traditional courts, even though somehow they existed, isn't there a possibility of making a provision for traditional courts?

CHAIRMAN: Since I am not a traditionalist that question is addressed to honourable Mr Matjila.

MR MATJILA: Mr Chairman, I am trying to be helpful to my colleague, whether traditional courts do not fall under the lower courts or customary law. We have included in this Constitution Customary Law.

ARTICLE 79 AGREED TO.

ARTICLE 80 PUT.

MR KATJIUONGUA: Mr Chairman, is it not possible that here we simply stop at the Supreme Court itself and end there, because if you don't add anything else, it could imply that if we say the Supreme Court is the supreme interpreter of the Constitution, then its authority on constitu-

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tional matters must be final. Therefore I think either we end after "itself" or we qualify that its position is final on matters of constitutional nature and that on any other matters parliament may decide otherwise. But then the court's decision or constitutional interpretation is final. That is my fear there.

MR RUPPEL: Mr Chairman, I don't think there is anything to look into by the lawyers. If one approaches the subject from the other side and says if the legislator could not have the final word, what would that mean? That would mean a very undemocratic measure and that would leave the Supreme Court with the final say about what laws should apply in this country. Surely, if the Supreme Court makes a decision on the Constitution as it stands in January 1990 and this honourable House, converted into a National Assembly, decides in two years' time to change a provision on which the court had already made a decision, then that decision of that court cannot stand anymore, because it has been overcome by an amendment to the Constitution itself.

The provision here clearly says it must be lawfully done, which means it must be constitutionally done. There is nothing wrong with it. Thank you.

MR KOZONGUIZI: Mr Chairman, to add to what the honourable Mr Ruppel had said, usually the intention of Parliament is looked at when a law is being considered. Now the Supreme Court may have an interpretation which does not necessarily coincide with the intention of Parliament, in which case Parliament, without in any way impugning on the integrity of the Supreme Court, can override that decision by passing another act which would reflect their actual original intention. That is why this should be retained as it is.

MR KATJIUONGUA: Lawyers or no lawyers ... LAUGHTER ... they are also human beings as far as I am concerned. Sometimes they can help you out of trouble, and sometimes get you into trouble.

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I am trying to say - and it is only a matter of caution - the situation where you have a separation of powers, in Britain parliament at the end of the day is supreme also in terms of interpreting laws, more or less. In the United States where you have a totally different system, Congress makes laws, the Supreme Court interpret laws, including the Constitution of the United States, and its interpretation is final.

So, I am afraid that parliament may, through a creeping way, practically end up amending the whole Constitution. If people say no, then I reserve my position and you may continue, but don't say I didn't warn you. LAUGHTER.

CHAIRMAN: It stays as it is.

ARTICLE 80 AGREED TO.

ARTICLE 81 PUT.

MR RUKORO: There should be a Sub-article (5) and it reads as follows:

"The Supreme Court and the High Court shall be entitled to regulate their own procedure and to make court rules for that purpose."

It was in the original draft, the typist might have forgotten about it.

ARTICLE 81 AGREED TO.

ARTICLE 82 PUT.

MR KAURA: Mr Chairman, I am still coming back to the traditional courts. Under the lower courts now provision is made for the traditional courts. I am being referred to Article 65 on page 46 under Customary and Common Law, but that must also be included under the lower courts, that the traditional courts will be in existence and adjudicated over by whatever persons adjudicate over traditional courts, because they are in existence at this particular point in time, they adjudicate over certain matters that have to do with that particular local area, and I think they must be included here instead of totally excluding them.

MR ANGULA: Mr Chairman, I do respect traditional law,

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that's fine and I am happy that Article 65 recognises the Customary Law. I think we should stop there, otherwise if we sanction the practice of customary laws and traditional laws, some of them we don't know. We are facing something which at the end of the day will have contradictions in society. Let the traditional things be left to the traditional authorities, they know how to administer it. To put it in the Constitution, I think you are subjecting every citizen of Namibia to a particular traditional law of a particular community and I think that will bring a lot of confusion.

MR RUPPEL: Mr Chairman, I just want to say that the traditional courts are provided for in legislation, and there are, in terms of our Constitution, tribunals which are subject to the rules of administrative and natural justice. I think in that way they are perfectly well catered for here and one shouldn't take it further and institutionalise the court structures. It is sufficient to provide for the protection of so-called traditional law in this Constitution. I think if we build on more and more courts it is not going to be helpful in the end.

MRS ITHANA: Honourable Chairman, I thought the courts that my honourable brother is talking about is covered under the lower courts, and further than that, Article 82(1) says:

"Lower Courts shall be constituted by Act of Parliament."

When this act of parliament is going to be enacted it is when stipulations are going to be made as to what these lower courts are and how they are going to operate. So, they will have a place in our Constitution.

MR KAURA: Mr Chairman, I am not yet satisfied and I would like to give a little lecture to my former junior at Columbia University, the honourable member Mr Nahas Angula, on traditional matters.

Mr Chairman, what I would like us to recognise at this

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particular point when we are writing a Constitution is this: For the next hundred years we would remain with traditional courts and they will remain in existence whether they are recognised by law or not, as it has happened during the last 73 years of colonial rule in our country. They existed and they are still there, and I can give you an example.

If I am married traditionally according to Herero custom, then I must give two heifers and an ox, that is "labola", I pay "labola", and at the dissolution of that marriage, if I divorce my wife, according to traditional law I give six cows and if she divorces me - the Herero's are believers in equality - she gives me six cows. That is the tradition. These matters never appeared before the European courts. Whether they are included here or not, they will still exist, and I feel it was only due to arrogance of the European colonisers, who never recognised the existence of our judiciary, and I think we, as the founders of this nation, must recognise the existence of the judicial system of the black people that existed in this country prior to colonialism.

DR AMATHILA: Thank you, Mr Chairman, I am standing up for the first time and I am going to fail the Assembly-language, but I think I am going to speak the layman's language so that we can understand each other.

For example, when your husband dies, both in Kwanyama and Herero, the families of the husband come and clean up the house before the body has even gone down six feet.

If in the modern times I am married to Ben Gurirab and we have six children.. LAUGHTER ... and he has made a will, traditional courts will come and disregard the will and do the usual of cleaning up the house. How do we deal with this issue?

MR BARNES: Consult an attorney.

MR KOZONGUIZI: Mr Chairman, all those things are very interesting, and to help my honourable colleague here, I can say that it provided that lower courts shall be constituted. It means that all the lower courts are going to be constituted. It is not only the traditional, but it

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could also be the "small claims" courts and others. The fact is that an act of parliament will establish the traditional courts and that will have to give them the powers. These powers cannot be left to the interpretation of either the honourable Amathila or the honourable Kaura. So, an act of parliament will create the traditional courts and define their powers. The reason being, as far as I am concerned: when I go to a traditional wedding, at every occasion you find that the procedure is different. Thus there has to be some kind of order and consistency that can only be brought about by an act of parliament. That is why it should be left to an act of parliament to create traditional courts.

REV WITBOOI: Thank you Mr Chairman, honourable members of this House. Being a traditional leader I think to some extent I would support the idea of traditional courts to be recognised somewhere and that there should be some provision in the Constitution, because I know that, we as traditional leaders, after having tried people in traditional courts, had been tried in the colonial courts, it will be proper even to give guidance, because there can also be abuse of traditional powers, and I don't know to what extent that can be prevented.

So, I am in full support that the government of the day should also have some kind of control by having it in the Constitution, the control over these traditional measures. That is my contribution. I am in full support as a traditional leader, because I am going to try some people as a traditional leader. LAUGHTER.

CHAIRMAN: I think the Chair should rule on this one. I listened to the traditional leaders, and I am one of them, and I think we are covered, because the lower courts shall be constituted, and under that, when we come to parliament to debate that act, that is where we must fight as the traditional leaders so that our views are included. With that ruling it stays as it is.

ARTICLE 82 AGREED TO.

ARTICLE 83 - 84 PUT AND AGREED TO.

ARTICLE 85 PUT.

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MR MUDGE: Mr Chairman, I think it is now time that we get some clarity on this new animal called an attorney-general. It has been shifted from the one side of the table to the other side of the table without anyone of us now exactly knowing whether he is going to be a civil servant or a political animal, as we normally say.

We have made provision under the powers of the president to appoint certain people, including a prosecutor-general, who we all believe shall be a civil servant, an impartial person who will be able to judge without in any way being influenced by political affiliation when it comes to legal proceedings.

The attorney-general, for which provision is made under Article 85, as far as I am concerned appears to be a political appointment. I don't have any problem with that, as long as we know exactly what the position is. If it is a political appointment, very similar to the chairman of the planning commission - and by the way, Sir, I can't find any provision in this Draft for a planning commission, I think it has been omitted somehow, it was dropped by the wayside, but we will have to come back to that later then I would propose that if I am correct in my interpretation that this is a political - and everybody will know, when we talk about a political animal that this is a term that we have used in the committee, we are not making derogatory remarks about it, please don't get me wrong - that provision should be made for this appointment under the first category of appointments made by the president, namely the political appointments just after the deputy ministers, I think that is where it belongs.

Having agreed on that, then we must decide whether he should have the powers given to him under the following article - and I will not discuss it now, I will discuss it when we get to Article 86, but for the time-being I think it is just necessary that we will clearly define this position.

In terms of Article 85 he will be appointed by the President in accordance with the provisions of Article 32(4)(a). If you look at 32(4)(a)... INTERJECTION. No, initially it was 32(4)(aa) and (bb) and we said it must come in there. I think this provision must be made under (aa), (bb) and then somewhere between (bb) and (cc). It must come in somewhere there. It cannot be one of those people appointed under (ee), because those must be civil servants. We have decided to move (ee) over to the next subparagraph. I was just trying to get clarity exactly what are we talking about here. Once we have done that,

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then I think we can talk about the duties and responsibilities.

CHAIRMAN: Do we agree it is a political appointment?

MR RUKORO: Mr Chairman, I agree that it is a political appointment and for formality sake, this office should become the new (cc) on page 29, instead of the Chief of the Defence Force, and while I am still standing I can add that the new (dd) should become the Director of Planning.

MR MUDGE: Mr Chairman, being a personal adviser to the president, I think we should not prescribe or dictate too much. I think if we say that he will be the personal adviser to the president, that's it, but we should not give other functions to such a person, for instance to be responsible for the prosecution and defence of appeals in criminal proceedings in High Court and the Supreme Court. I think it is unacceptable that a political appointee should have these powers. I think that would be wrong and I believe these powers should be given to the prosecutor-general and should not vest in the attorney-general in his present position. But on the other hand, I think he could have a wide range of responsibilities in his capacity as an adviser.

MR ANGULA: I would like to make a general comment, first to recognise that it is important that the judiciary is independent. Having said that, we also recognise the fact that persons or individuals have integrity. I think we should take that into consideration. I don't like the reference made that since I am appointed by so and so, then I am kind of beholden by him, despite my training, my convictions and my integrity. I do believe that there are a lot of people who are doing prosecution in this region who were appointed by political authorities, but in most cases they do stand by their own integrity and they do a good job.

So, if we are going to separate powers in terms of what the prosecutor-general should do and what the attorney-general should do, we should not do it on the basis that

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the attorney-general, since he was appointed politically, will not have his integrity. He will have his integrity, I believe so. I think this learned gentleman has ways of standing up to the call of the profession.

Having said that, I have no quarrel with the proposal that some of these functions should go to the prosecutor-general, and the prosecutor-general for sure must be a civil servant in the true tradition of that profession.

DR TJIRIANGE: Thank you, Mr Chairman. The question of subordination comes in here. Traditionally under the system of Commonwealth countries the prosecutor-general is within the office of the attorney-general for subordination reasons, but when he does his work, he is independent.

Where does this prosecutor-general of ours fall? Is he still in the office of the attorney-general, or if he is independent from that, is he in the ministry of justice or how does this subordination come in in the structure? I would have thought that it doesn't make any difference if he is in the office of the attorney-general for the sake of administrative convenience, but when it comes to his work to prosecute, he is absolutely independent, he doesn't get his directions from the attorney-general. But there must be a certain kind of subordination within the system.

MR KOZONGUIZI: Mr Chairman, I think this is rather a difficult one to distinguish between the political implications and the judicial functions. With the Attorney-General we will find that what is envisaged here in Article 32, is a man who will be an adviser to the president, and in that respect he is actually not the man who is dealing with the day to day work of deciding whether someone should be prosecuted or not, and through that, as I see it, what the honourable Mr Mudge was trying to say is that the powers and functions of the attorney-general on page 56, Article 86, should now be given to the Prosecutor-General, because he is the man who is now going to exercise the final responsibility for criminal proceedings, etc. The other point is that we have a confusion of descriptions. For example, in the British system they have an Attorney-General who is a political appointment,

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but who has the functions of initiating prosecutions. Not only is there an Attorney-General, but you also have a Solicitor General under him who is also a political appointment and who is supposed to be his assistant. Then comes under them the Director of Public Prosecutions, who is in charge of the actual prosecution of people. He advises the Attorney-General, but the Attorney-General is the one who decides whether to prosecute or not and the Director of Prosecution is the one who actually does the work.

What I have said really is that the Prosecutor-General should come under Article 86 where the powers and functions of the Attorney-General are described. But I have a little problem which I think could be interesting to this Constituent Assembly. When you talk about an Attorney-General, you translate it in Afrikaans as "Prokureur-generaal". We still have to find a word in Afrikaans for the Prosecutor-General. There is a Solicitor-General in the British system. It is difficult to know what to call that in Afrikaans if you already call the Attorney-General the "prokureur-generaal", because I would have thought the attorney (or prokureur) here is the solicitor in England. So there is a bit of a problem. With the prosecutor we would come to "vervolger" or something like that, which doesn't sound nice for that kind of office.

But to come back to what I was saying, let's settle for (aa) under Article 32, for the Attorney-General, and the Prosecutor-General then becomes a civil servant like the present Attorney-General here.

DR TJIRIANGE: The present attorney-general is in the Department of Justice here. I am asking, where is ours going to be? I was thinking he would be in the chambers somewhere subordinated to the attorney-general like in the systems of Commonwealth countries where he is actually subordinate to the attorney-general. So now that we have done that, the subordination has been removed, he is removed from the office of the attorney-general. To whom is our new man subordinated?

MR KOZONGUIZI: Directly to the ministry. He now comes under the Minister of Justice. The prosecutor-general will now be under the minister of justice. The position now is that the attorney-general is in the Department of Justice. The only thing is that the minister does not interfere with his day to day decisions as to whether to

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prosecute or not. But administratively he is a subordinate of the Minister of Justice.

MR RUKORO: Mr Chairman, I was going to propose that on the basis of the contributions made here, it has become clear that we really need a complete redraft of Articles 86 and 87, and maybe with a view to that we should suspend further discussions on these two provisions until the lawyer members in this House can come together with the legal adviser and sort this matter out. Then we can bring a draft to the Assembly, maybe within 24 hours or so.

CHAIRMAN: So decided.

ARTICLE 88 - 89 PUT AND AGREED TO.

ARTICLE 90 PUT.

MR BESSINGER: Mr Chairman, dealing with the language and the concept represented in (1)(c), I would like to refer this honourable House to a document that was distributed yesterday to each and every member under "Environmental Protection Provisions for Namibian Constitution", a document that by now is referring to the clauses, as they have been articulated now, in a different way. But I would like the formulation under (c) to read:

"(c) the duty to investigate complaints concerning the over-utilisation of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia."

If honourable members want an explanation, clarification, I would do so. If they accept the wording as I have suggested they will save me that argument.

MR GURIRAB: I wholeheartedly accept the amendment.

CHAIRMAN: The amendment to (c) is adopted.

Article (cc) will refer to DDP instead of AG.

ARTICLE 90 AGREED TO.

ARTICLE 91 PUT.

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MR TSHIRUMBU: Thank you, honourable Chairman, it is my first time to take the floor. I have gone through this Draft Constitution so carefully, probably not as many times as many of the honourable members of the House. I know some of the honourable members know the Draft Constitution even by heart. During my reading of this Draft, I have seen no paragraph or phrase in protection of an element of state secrecy.

CHAIRMAN: Honourable member, we are on Article 91.

MR TSHIRUMBU: Yes, it is exactly here, Article 91(d). I therefore have the honour to come up with an amendment, especially to this paragraph. This would also apply to the articles that we have already bypassed, namely Article 59(3), Article 62(2)(f) and Article 73(2). The amendment that I want to make here - and it is for the lawyers maybe to go and put it in much more legal terms - is that provision should be made for matters related to national security to be dealt with in a way which is not to the detriment of such security in a democratic state. So, if this provision could be provided to the other articles above referred to, then we would proudly say that state secrecy will then have been protected. If this is reflected somewhere else in this Draft Constitution, please guide me. Thank you.

CHAIRMAN: Honourable member, we are on Article 91. I am willing to accommodate discussion on that, but to go back to all other articles and the honourable member was sitting here all this time, I think cannot be done because we have decided on them. There is a proposal to protect state security under the Ombudsman's discussion. I do not think it is the place, but maybe when we come to Defence Force.

MR MATJILA: I wanted to propose that in Sub-article (c) of Article 91 we remove "or interrogate" as the word is often associated with strong-armed tactics.

ARTICLE 91 AGREED TO.

ARTICLE 92 PUT.

MR RUPPEL: Mr Chairman, in the two last lines there is an exception made in this definition clause of what an "official" is in respect of which the Ombudsman can investigate. It refers to judges, but it does not refer to magistrates. In terms of Article 77(2), which deals with the independence of the judiciary, it refers there to the independence of judges or judicial officers and that no person should interfere with their judicial discretion once it has been exercised. So, I think magistrates

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should also be referred to here together with the judges, or maybe "Judge of the Supreme Court or the High Court or judicial officers."

CHAIRMAN: Any objection? None, so we will add them.

ARTICLE 92 AGREED TO.

ARTICLE 93 PUT.

MR RUPPEL: Article 93(2). We said that judges can only be removed on the grounds of mental incapacity or for gross misconduct, etc. Here we removed the Ombudsman for physical incapacity. I think it should be mental incapacity to be consistent.

MR VON WIETERHEIM: Mr Chairman, there is also an incorrect reference to Subarticle (2). It must be Subarticle (3).

MR RUKORO: Just after Sub-article (4) I think we need another article on qualifications for this person. As far as I know we are just making provision that he must be appointed, but there is no provision as to what qualifications this person should actually possess. So, maybe we need a new article which could be inserted immediately after Article 89 to set out the qualifications for office.

CHAIRMAN: At the beginning of Article 88, after you have (1), (2) and (3), just make an additional (4) and add qualifications. We do it at Article 88 - Establishment and Independence.

ARTICLE 93 AGREED TO.

ARTICLE 94 PUT.

MR KAURA: Mr Chairman, I would like to express my reservations on the last sentence of paragraph (1)(a), "to provide maternity and related benefits for women." In the age of equality I think that is discriminatory.

CHAIRMAN: We note the reservation.

MR BESSINGER: Mr Chairman, again with the same references as I have made in my earlier submission, and for reasons explained in this document, I read this paragraph to be

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long but it appears not to be long enough. So we will have to extend it a little bit. Especially since it resides within the chapter of the principles of state policy we have to be a little more specific, and this is the new wording that I would like to propose:

"That eco-systems, essential ecological processes and biological diversity are maintained and the living natural resources are utilised on a sustainable basis for the benefit of Namibians, both present and future. In particular the government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory."

CHAIRMAN: Agreed.

ARTICLE 94 AGREED TO.

ARTICLE 95 PUT

MR KATJIUONGUA: Mr Chairman, maybe by this time I am already working on the nerves of my distinguished colleague Mr Gurirab, but it is not intentional, he will have all my support in his foreign policy. But I want him to accommodate me on this question:

We discussed this question in the committee, there was a small subcommittee, we agreed at the end of the day on positive neutrality and then when the big committee came back it was thrown out.

Now, Mr Chairman, this question is very, very important for me. I have some interest in foreign policy and I am very much concerned here. I want (a) to read as follows:

"adopts and maintains a policy of non-alignment and permanent neutrality and peaceful co-existence"

for the reasons that I said the other day. Now I want to add an (aa) there:

"peaceful co-existence, non-alignment and permanent neutrality in foreign relations shall not mean that Namibia will keep silent about the violations in our neighbouring countries or elsewhere in the world of the values and principles for which Namibia stands."

I am making this an extension of the first one simply because this is basically a document of fundamental principles, so that it makes clear, that while we are non-

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aligned, neutral, practising peaceful co-existence between states with different social-political systems, it does not mean that we will not say yes or no to things that are wrong morally elsewhere in the world, in South Africa, elsewhere, Angola and maybe some islands in the world. It is the principle that I am concerned about, that co-existence and neutrality don't mean that we will not oppose apartheid in South Africa or things that are wrong in South Africa or anywhere in the world. The intention is simply to keep our country out of conflicts and to avoid this country becoming a target of outside attacks. That is the reason for that, and for me this is very, very important. I don't see any contradiction at all, I think I have made my case the other day. So I am begging my good brother to cool down his resistance to this sort of proposal so that I can fully support his foreign policy.

MR GURIRAB: Thank you, Mr Chairman. I do not expect that whoever is going to be the foreign minister of the Republic of Namibia would consider himself or herself as the person that would make the foreign policy of our country. I would expect the formulation of the foreign policy of our country to be the product of a process that will involve the executive and the legislature, indeed the public out there, all branches of the government and the public.

Indeed, we spent quite some time in the committee exchanging views on this and as a result of those exchanges we attempted to enlarge the article. For example, if we read (a) in conjunction with (e), and I will read (e): "encourages the settlement of international disputes by peaceful means", I would consider that to speak to the same point of advocating peaceful co-existence, and therefore I do not consider it necessary that it be added onto the concept of peaceful co-existence, added onto sub-item (a).

The ideas of positive neutrality were relevant at some point in international relations, but as concepts they are very much outmoded now. Non-alignment has come to represent something very dynamic. It was perhaps in terms of its historical origin a response to the international situation, a reaction to power blocs; but it has come to represent something unto itself, a coming together of the majority of the member states of the world, an association to which others, who are not members of that association, are now increasingly seeking some kind of association, either observers or as invited guests, whether they are

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from the East or from the West.

So, our declaration of upholding the policy of non-alignment really embraces everything that my distinguished colleague is advocating. So, we are quite covered as the article stands now.

MR ANGULA: Mr Chairman, first I would like to say that we agreed upon this formulation as a subcommittee and the honourable Mr Katjiuongua was part of that subcommittee, and I don't understand why he wants to come back to issues which were basically settled there. He can express his reservations, that I understand, but to try to redraft it again, I think, appears to me not quite appropriate because otherwise we can also redraft other things we don't like in this Constitution. I for sure would like to go back to the elections of the members of the Assembly, I want it to be redrafted so that you are elected directly by the people in constituencies.

Having said that, I think honourable Gurirab has put the case quite clearly and I would like to say that the concept of neutrality is a very strong idea and we cannot simply enforce it on our people. If we want it, we must go out and have a referendum and ask our people whether they want this country to be neutral as a whole. So I think we should just leave things as they are and leave that to the executive in terms of actual policy-formulation of what should happen. I believe that that policy will, as honourable Gurirab said, be the product of all of us interacting and debating and agreement on certain principles. But for the time-being, as we agreed on the subcommittee, we must leave it as it is.

MR KATJIUONGUA: Mr Chairman, I want to make a correction. It is incorrect for my distinguished colleague to say that this matter was settled in the subcommittee. The fact of the matter is that the subcommittee agreed on positive neutrality and when the main committee met it was taken out. I disagreed and I said I am going to bring it up here. For me it is a very serious matter.

There is a strategy working in this House that everything is covered elsewhere, and then people are getting away from being specific on the issues. I hope you are not

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creating confusion in the future. It is convenient to say it is covered elsewhere and people escape away from the responsibility of being specific. I don't share that strategy.

I really hope that we all know, who have a bit of knowledge of foreign policy, that peaceful co-existence is no longer a phrase of the Belgrade Conference of 1955, it is no longer a phrase of Nikita Krushchev of the Soviet Union. The five principles of peaceful co-existence were adopted by Kwame Nkrumah, by Abdul Nasser and others. I think non-alignment came later on by the non-aligned countries that met in Belgrade.

I must say the fact of the matter is that there is a greater question-mark today on the ability of many or some of the non-aligned countries to call themselves non-aligned. It is a fact. The neutrality of Sweden, of Switzerland and Austria is beyond question and in the process these countries have avoided being involved in outside conflicts and they are rich today.

It was said this morning that the definition of war is that there could be a war in a neighbouring country and then we may declare war here as well. I am afraid of those things; I want to be very careful.

I don't want to hold you up, I want to give brotherly advice in good time: Be careful of too many loopholes, tomorrow you may regret. If the majority of the Assembly prefer to leave things as they stand here, I want to record my strongest, firm and resolute reservation. Thank you.

MR MUDGE: Mr Chairman, initially I wanted to remain neutral in this debate, but after the honourable member Mr Angula spoke, I am afraid I cannot remain so any longer. The honourable member provoked me when he threatened Mr Katjiuongua, saying then we must go to the people.

Mr Chairman, you will all know that in the beginning the DTA was opposed to the inclusion of this chapter in the Constitution, because it is not enforceable by law and because policy, according to circumstances prevailing, change from time to time. One of the reasons why we remained silent so far was because at this point in time it might be the right policy to be neutral or not to be neutral, and it might change in future. In other words, it

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is very difficult for us at this point in time to decide whether we want to be neutral or not to be neutral. It is not as easy as people think to take that decision.

One should not bring things into a constitution if you think it is possible that it is going to change in future. The same applies to non-alignment, and I can tell you, Sir, the same applies to many of the principles included under this chapter. But whether we bring it in here or not, our party will definitely have some views on this whenever we discuss policy in future.

At this point in time, Mr Chairman, I want to make it clear that we would prefer neutrality to be in here, for the simple reason that this young nation cannot afford to get involved in other country's wars at this point in time, because we will need all our resources, including our human resources, to build our country, and I don't think we should be angry with one another because some of us feel strongly about neutrality. I don't think there should really be such an issue, because it depends very much on the conditions and circumstances prevailing at this point in time.

But I also want to put it on record, Sir, it does not mean that the DTA will ever be neutral when it comes to ideologies that we cannot support and I want to mention specifically, just because I don't want any misunderstandings to exist, that we cannot agree with policies of separation, apartheid and discrimination, and we will at all times express ourselves as far as that is concerned. But I want to support the honourable member in his effort to maintain a position of neutrality, even if it is not included under this chapter.

MR GURIRAB: I want to say, Mr Chairman, that I do not see any voices being raised in this House to threaten. I see flowing everywhere here a tremendous sense of humour. We are laughing as we embark upon this very important historic task. For the benefit of those who are here as strangers in the House, it was even more beautiful in the standing committee than what it is here. It is that sense of humour and give and take that enabled us to produce this document. We are simply continuing the exercise we had in the committee.

I look at our own situation. Just last year we were engaged in a war as a people. I do not see, and particular-

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ly on this side of the House, anybody engineering, scheming, contemplating war. We experienced it, it is ugly. I don't see my Namibia to be one scheming, spending millions of the tax-payer's money to plan war. I don't see that. But not only here in Namibia. In the whole region of Southern Africa I see us moving away from the destructive politics of confrontation and war. The word now in currency is negotiations, let us talk. This is what our neighbours are trying to do now in South Africa, this is what I see. Internationally also I see the same thing. We are moving away from militarism, from war. I see conflicts being resolved now through negotiations, I see mushrooming of negotiation meetings everywhere in the world. I see super powers talking to each other, wining and dining each other in their capitals. I don't see war on the world scene. So, let us not be prisoners of the past, let us not be so subjective about the immediate past, that we see Namibia being in a position to contemplate war. I don't see that.

Earlier this morning I was making a point which was misunderstood: the spill-over effect. During teabreak I was citing an example that because of wars elsewhere, refugees run into another country by their thousands, and settle there. On the basis of international conventions this particular country, which has become the host of these refugees, assist them. The home country of these refugees interprets that as an act of aggression or hostility against it and carries out what is called a hot pursuit into the territory of this peaceful, democratic, law-abiding host country. That is how conflict develops. I hope that we will not be spending our time when we convert this House into the National Assembly to discuss war. I hope we would be living in peace, and allocating money for housing, for education, for health, for good government.

So, I just don't see the threat of war, I don't see that as being part of our political culture in the future.

MR RUKORO: The solution, Mr Chairman, is that I was one of those who didn't entertain any strong ideas or sentiments about the question of neutrality. I am tempted to say I was also going to remain neutral just like Mr Mudge, but listening to the debate here, I thought that maybe somewhere I need to jump in. I have a lot of sympathy for honourable member Katjiuongua's new formulation. I think it contains new ideas which were not before us in their present form at committee stage. I have problems with the

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idea of permanent neutrality. If we can drop the word "permanent", I think I will be tempted to say I will go a long way towards leaning towards your suggestion.

Secondly, I think your new qualification of what neutrality does not mean is very significant in the sense that neutrality, as you elaborated on it, does not mean that Namibia will keep silent about the violations or destruction of values and principles that are dear to us. I would like to go on and to add there that neutrality also does not mean that Namibia cannot resort to the use of force for purposes that are consistent with the Charter of the United Nations or this Constitution. With that type of amendment I think we are really on strong ground and I would commend the honourable member's new formulation with my amendment to the rest of the House.

CHAIRMAN: There is a slight amendment to remove "permanent" and just say "adopts and maintains a policy of non-alignment and neutrality." It is a compromise.

MR ANGULA: I want to register my reservations to that, that I totally disagree with this concept of neutrality being forced on us here. This is a very, very important issue and I totally agree with Mr Mudge that it is very important and if we want to resolve it, we must put it to the nation, the people. Let our people decide whether they want this nation to be neutral. We cannot just decide it here. Let we remain with non-alignment which is better known to many of our people and fullstop.

MR BOTHA: I do not really understand why we should now include this neutrality concept here. The word "neutrality" can have many, many meanings, and by already starting to give different qualifications to what we mean with neutrality, it becomes sort of redundant. We sort of disqualify what we say by qualifying neutrality. So, why do we have to use the word "neutrality" at all? Non-alignment is quite clear and in other articles we have made it very clear that we are not going to make war, we are only going to defend our own nation.

So, I would request that honourable member Katjiuongua would just leave the word out and trust that the rest of the Constitution makes quite enough provision for the kind

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of peaceful nation that we want to be.

MRS ITHANA: Honourable Chairman, I don't know where we are coming from, because those who have adopted a policy of - whether it is permanent or temporary - neutrality, they did so coming out of wars with their neighbours, during the First World War, for example, or the Second World War. This is where this concept stems from. We are here, and I repeat my words of yesterday, let's come back to Namibia and draft a constitution for Namibia with an understanding of our own situation and out of that own situation we come out with concepts that we will be comfortable with, and our people will be comfortable with. We are talking about neutrality, a terminology that was used by Europeans because they had their wars there. Now we want to transplant that from all those miles away to come and plant it here. Because of what? What do we have in mind?

We have waged a liberation struggle in the country, we have won it, we have adopted our policy of national reconciliation within our country. That is strong enough to make everybody accept one another, and I think without further complicating issues, let's live with what we know and what comforts us and our people. Thank you.

MR HAMUTENYA: Thank you, Mr Chairman. I realise that honourable Katjiuongua feels very strongly on this issue, he registered his views on this in the subcommittee, the issue was brought back to the standing committee, we felt that we did not really need this word "neutrality" and consensus emerged then that we were going to leave it out. We are back to it now that we should include the word in the drafting. He mentioned three or four countries which pursue the policy of neutrality. He told us how wonderful they are. Of course, we know the examples, how countries like Switzerland and Sweden in Central Europe were forced by Stalin to accept this, it was not their free will. It was something dictated to them.

Honourable Gurirab cited that unlike neutrality, non-alignment enjoys the embrace of the overall majority of humanity. I know we want to be special. Apparently we want to be so special that we are doing things which others have not done and we also want to run away from

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those ideas and policies which the majority of humanity found appropriate. Very few countries, about five of six in the world, have adopted this policy. There has not been an attraction to this concept of neutrality by the majority of the nations in the world and I don't see why we should emulate this tiny minority of nations in the world. I would like to be where the majority of humanity is, and I think that we can meet all the requirements of peace by simply limiting ourselves to non-alignment.

I am therefore proposing, Mr Chairman, that we leave the formulation as it is. Adding neutrality does not in any way strengthen our Constitution. On the contrary it weakens it for no good purpose. Thank you.

CHAIRMAN: We have debated this issue for a long time, it looks like old positions are still being maintained. Mr Katjiuongua made a very, very strong reservation and gave friendly advice. If he lives for too long, just like me, and when we are in trouble he will say, "I told you so." So I think he is on record. We leave it as it is.

ARTICLE 95 AGREED TO.

ARTICLE 96 PUT.

DR TJIRIANGE: I think there is an omission. There was a word erased after "political beliefs." I remember very well there was a word. I don't know whether it reads well to say: "The State may provide for asylum.." May grant asylum?

MR KATJIUONGUA: Mr Chairman, I know the reasons why we put this article in this particular fashion, that we should have a discretion to allow people or not to allow people, especially as a country bordering around five other countries and we have a small country with a small population, so maybe we should have that discretion. But I thought - maybe I am wrong - that we also agreed to associate ourselves with the Geneva Convention on Refugees. There are many, we can investigate that.

As a former refugee myself, with a history in life that I can never forget and by definition I am sympathetic to people in that situation, because I left this country when I was 17 years old in 1959 and came back in 1981. Practically, from Botswana in 1960 until I got to Cairo in

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1961, I spent most of that time as refugee. Practically, from Botswana to Lusaka - when I became Tom Mukwandja as was referred to here - up to Tanganyika where I stayed with the first refugees in a camp. I was one of those until my brother Garoëb came to join me. From there, practically, I walked, sometimes by bicycle, with two of my colleagues from Dar-Es-Salaam to Nairobi, Uganda, all the way up to Cairo. I know what refugee means, the sufferings that you go through, and because of that I somehow feel that a reference to our association with the Geneva Convention on those problems, even if you don't make it a constitutional issue here, these are principles of state, that we associate ourselves with those conventions.

It may seem that now, because we are no longer refugees, we are indifferent to people in a similar situation although we have a discretion. But I want us to look more sympathetic and not sort of dour and sour and indifferent. That is why I feel an association with the Geneva Conventions makes the point.

MR TSHIRUMBU: This paragraph makes me think back to some of the religious denominations that are being fought against by the state in which these denominations are found, and I am afraid that elements of some of these denominations that have no respect for a state, that have no respect for the constitution of a given country, the flag, president, I think that we are giving a loophole to some of these.

I remember in the late sixties - let me mention it and I am sorry if there is a member here of the Jehova Witnesses - they were banned in, for example, Zambia, they were banned, I believe, in Malawi, they were banned in some other African countries. I think we are opening a kind of loophole here for these elements to come and disrupt....
INTERJECTION. I am sorry if the word is not suitable for the House. But let us think of formulating something that would bar the activities of such religions in our country. Thank you.

CHAIRMAN: This issue was discussed in the committee and we agreed on it. If we are going to mention it in accordance with the Geneva Convention, we are leaving out other conventions, like the Africa Charter on Conventions.

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ARTICLE 97 - 99 PUT AND AGREED TO.

ARTICLE 100 PUT.

MR RUPPEL: Mr Chairman, if you will allow me I would like to take this House back to Article 11. I am sure that we will take the House forward by doing that, but it is only with your special permission. You will recall it deals with preventative detention.

ARTICLE 100 AGREED TO.

ARTICLE 101.

MR RUPPEL: If I cannot speak on the previous one, I will speak on this one.

Subparagraph (1), in the committee we agreed that the word "sex" - nice as it may sound - must come out in the third line of that paragraph. You don't determine regions with reference to sex.

CHAIRMAN: Agreed.

ARTICLE 101 AGREED TO.

ARTICLE 102 - 106 PUT AND AGREED TO.

ARTICLE 107 PUT

MR RUKORO: Article 107(b), could you add "or by law" at the end?

MR MUDGE: Mr Chairman, is that the correct wording? We all know what the honourable member has in mind, that certain functions could be given to the regional councils by law. But I will ask the lawyers to find the correct formulation if that is what he has in mind. I am not sure, maybe he is correct.

CHAIRMAN: He is an advocate, I think he is correct. But you have the right to consult your private lawyer.

ARTICLE 107 AGREED TO.

ARTICLE 108 PUT.

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same day. Are we becoming independent at night or in the daytime? LAUGHTER.

CHAIRMAN: Midnight, one minute past twelve, to be precise.

ARTICLE 126 AGREED TO.

ARTICLE 127 PUT.

MR MUDGE: I want to support the suggestion that we adjourn, because I will have quite a lot to say under this article, and I want to ask, isn't it possible that we can go back to Article 11?

CHAIRMAN: Article 11 is controversial, but we will go back.

MR RUPPEL: Quite the contrary, Mr Chairman. We had in-depth-discussions after we left here yesterday and left the preventative detention clause hanging in the air. We also had an opportunity to raise it with some colleagues in this House. Before I say what our attitude is, I must stress that the inclusion of provisions 11(4) - (7) in the draft of the committee was there for what we considered at the time to be sound concerns regarding the safety of our society and the state. It was taken there in good faith because we thought there should be a mechanism to protect our young democracy. The Germans call this a "streitbare Demokratie", democracy which is armed with sufficient weaponry to defend itself when it is attacked.

We had the opportunity to also consider other constitutions. There are in fact provisions in other constitutions. Perhaps we have become familiar to this concept of preventative detention as a result of our past association with South African legislation, perhaps too familiar, and that we overlooked the principle underlying this we were concentrating on the curbing of the powers to avoid abuse of powers. So, that was just briefly the background.

We have come to the conclusion that - in the words of the honourable Mr Rukoro, we should give human-kind and human rights a fair chance as we did with the concept of the death penalty - which exists in most of the democracies in this world, and not to start with an empowering provision which would enable parliament to legislate for emergency laws and preventative detention. We want to try it and in that spirit we have no objection if Articles 11(4) to (7) are removed. Thank you.

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ARTICLE 11 AGREED TO.

MOTION ON INDEPENDENCE DAY

MR GURIRAB: Mr Chairman, I move the motion. (Page 23 of the Minutes/Page 161 of these Debates)

MR GURIRAB: Thank you very much, honourable Mr Chairman. I did serve notice that I shall speak on a motion I introduced on 29th January 1990 in connection with a date for independence recommended by the standing committee to this honourable House. But I beg to request you, Mr Chairman, to first clear the air, to give some explanation as to how it happened that honourable Comrade Theo-Ben Gurirab was called upon to introduce the motion and I shall pick up from there.

CHAIRMAN: This is because of the question raised by honourable Kerina who said that the committee decided to propose this date, March 21st, as a possible date for independence to this Assembly. He said it should have been part of the report of the committee. Unfortunately there was no report and therefore we were advised that this can only be done through a motion. That is why the notice of motion was prepared and honourable Gurirab was asked to introduce it. I hope that will suffice.

MR GURIRAB: I am particularly inspired, Mr Chairman, by the speed with which we were able to cover so much ground this morning and this afternoon. I am delighted that we were able to accomplish what we accomplished in the spirit of laughter and sense of humor and indeed, that the exercise was more than useful. In spite of all the big brains in the standing committee, I found that there were some very original ideas that came up here in the Constituent Assembly and we are therefore the richer as a people in having the document before us that has been enriched by the contributions made here.

Outside this House there is lot of expectation. We are expecting to have friends here in our country from abroad, friends who have been part of this saga of the struggle of the Namibian people for freedom and independence, who have in many ways contributed to helping us to come this far. They want to be here to be part of the celebration and they want to know when that big party will be organised

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here. It was with this in mind that the committee, after discussion, decided on the date of 21st March 1990 as the day on which Namibia shall become a sovereign independent state.

The month of March, second only to the month of August, features very prominently in our history of resistance, and it is opportune, therefore, that we would achieve independence on that day, during the month of March. On this occasion, without going back into history, I move that this House endorse the recommendation from the standing committee and decide on this date, 21 March 1990, as the date on which Namibia shall become an independent state.

I so move.

MR KATJIUONGUA: Thank you, Mr Chairman. First of all I would like to repeat some of the sentiments I expressed in the committee - don't worry, don't put your blood up, I am not making problems. I tried to see on my calendar the importance of the 21st March. Then I established that it is the International Day for the Elimination of Apartheid, significantly referring to Sharpeville. It is a good day, we are also part of the history of apartheid. In a way it is a sad day because lives were lost and now we are talking about independence.

I said to some of my colleagues that in a sense it is primarily - I am not saying totally - mainly a South African occasion. I thought the arrival of the United Nations here was an integral part of our national history, but then somebody reminded me that the 31st March is close to April 1st, so maybe it is not a proper day. So I have retreated from that and as a disciplined member of the committee - that my friend referred to - I endorsed the proposal.

CHAIRMAN: Is there any objection to the proposal that this great nation will become independent on 21st March 1990, midnight?

AGREED TO.

APPLAUSE.

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ADJOURNMENT OF ASSEMBLY

On the motion of the Chairman, the Assembly adjourned at 18h35 until Thursday, 1 February 1990 at 14h15.

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