

**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3**

**12 JUNE 1995**

**VENUE: ROOM E 249**

2/4/3/9/28

CHAIRPERSON:

... Commission for Provisional Government. I see Honourable Member of the Advisory Panel of the CA present - welcome. I've got 2 apologies from Ms Verwoerd and Dr Koornhof. Any other apologies at this stage, none? Thank you. I think some aeroplanes are still flying into Cape Town and some people will still come. Congratulations to the National Party. We seem to have stayed in Cape Town this weekend to be present at this meeting. My congratulations. 'Baie geluk. Dit is mooi volwaardig. 'Jy kan sien dat hulle het a leier wat haar gesag kan afdwing'.

10

Welcome everyone. Now could I just on - 'nee jy beindruk my al die pad. Ek dink jy moet oorstap ANC toe, dat ons die ANC kan regkry né. Dit sal baie help. Jy's welkom, hoor'.

Ladies and gentlemen. I would like for problems of the timing of one of our Experts. I would prefer if we could first put point 5 of the Agenda even before reading the minutes, so that Professor Davis could address us on a draft text which has been prepared by the Technical Experts. Do I have your agreement with this? Agreed? right!. Then at

20

this stage, Professor Davis, do you want to sit in front? You can take my place.

**PROF DAVIS:** It won't me long.

**CHAIRPERSON:** You want to sit there.

**PROF DAVIS:** Yes. Firstly, thank you very much Mr Chairperson. I thought that our technical meeting was from 9 o'clock onwards. That is why I have to be in Jo'burg shortly. I thank you for your co-operation. 10

**CHAIRPERSON:** Sorry to interrupt you. Could I just ask - has all the members got a copy of the text - draft text.

**PROF DAVIS:** I see Mr Carrim has got a copy of the Weekly Mail as well.

**CHAIRPERSON:** You are not allowed to read Comrade. Everybody got copies of the text. Okay.

**PROF DAVIS:** We say thank you very much. Chairperson, the document I am talking about is one headed "Draft text National and Provincial legislative competencies. I think the introductory

20



paragraph is the one which members might want to think about for the moment. The desire here, is that we have spent a substantial amount of time in this Committee talking about issues of agreement and disagreement regarding National and Provincial levels of competencies.

There was certainly a desire, I think, on behalf of the CA that this Technical Committee follow the approach of other Technical Committees which is to try and begin to reduce our reports to some form of legislative text. And the desire is that, well if we can get a text with which everybody agrees is wonderful and if we can't, then at least to have an alternative series of text or clauses which reflect the diversity of opinion where such diversity appears.

10

Now, what I have done here, and indeed, it is quite interesting, if I may, right at the beginning, just to refer you as well to another piece of paper which should be on your tables, which is an unnamed piece, page 7 and 8, its a document prepared by Professor Venter - he will speak about it afterwards in which Professor Venter has attempted also to do that which I have done, which is to try to get

20



some legislative content to our discussion, although his report was earlier.

And if you look at the one that I have done or even the one he has done, there is not an enormous amount of difference. What I have tried to do here is to reduce to writing how - or the format by which legislative authority of the Provinces should be put into a Constitution. Now, obviously these clauses would appear in different parts of the Constitution, but clause 1 is gives us the idea that the legislative authority of the Republic vests in Parliament. But that clause 2, which would be under a separate part of the Constitution of the legislative authority of the Province vests in provincial legislatures, etc.

10

This is only an attempt to draft in that it tries to accommodate the possibility of exclusive and concurrent competence. It might well be that one doesn't want that - that one doesn't necessary want to make a division between exclusive and concurrent competence and indeed, in certain of the parties submission, the idea of exclusive competence has been reduced to an Executive as opposed to a legislative

20

competence and I simply must point out that this is not necessary the only way can go about the business.

But indeed, if one looks at Professor Venter's draft, there is no reference to exclusive or concurrent competence partly because of the submission there that exclusive competence is a problematic term in Constitutional Law and indeed, it is. But here what I have done it to say that there is exclusive competence related to the functional areas specified in Schedule 1.

10

But I have not put down what is in Schedule 1, because quite frankly it was difficult enough to get what I have got here without sort of getting everybody's blood pressure increased by putting a schedule down. That clearly is something which is something, which I think, with respect more detailed than principles seeing that the structure works.

I then point out 2.2 (b): the laws with regard to any other matter where National Law establishing prescribing or regulating frame-works for the achievement of National objectives, specifically authorised as an enactment of

20



Provincial Law - now that is an attempt to accommodate, and you can read with the footnote 3 - an attempt to accommodate the idea of framework legislation and I think little clause should also be red in the light of the memorandum which is tabled today by Professor Venter regarding framework legislation.

Then, what I have also made provision for, and again this might not meet with approval the idea of concurrent competence. If you look at some Constitutional (inaudible)... , there is no doubt about it, if you look at the German.

10

There are different kind of categories which are listed relating to exclusivity and concurrency and framework, so it is not as if there is no president for this approach. But it does at least give members an opportunity to vex their minds with regards to questions of exclusivity and concurrency. My own view, for what it is worth, is that we can deal with that quite easily.

20

The real core issue is in 3 which is a conflicting law and I should not make any bones about it. Now, what I have tried

to do here is divide the issue of the override into two, which is where I suspect, exclusivity and concurrency might well have some relevance.

With regard to exclusivity, you will observe under 3.1 that the National Law shall prevail over the Provincial Law where certain things occur, a, b, or c. Now one can debate these issues. I will not rely exclusively on 125 or 126 of the present Constitution for the simple reason that I think that when you look at 125 and 126 and I read the parties submissions that there is far too much Constitutional concept contained in those concepts. If you, for example take the simple proposition under our present Constitution of interprovincial commerce.

10

That, in itself, gives rise to a whole body of jurisprudence about an override let alone all the others, so I think that the draft, with great respect, the present draft, was highly ill-advised in the sense that it attempts to do too much and my approach, quite frankly, I must be honest, is that I think one wants to do as little as possible in the Constitution rather than too much.

20



Legislation can deal with the too much. It might be thought that it is too much itself. What I have tried to do is to take out the salient bits of the present bits of the Constitution. Look at the Constitutional principles and attempt to cull as best I can some of the principles of an override of other Countries and those of you who are acquainted, for example, with the German Constitution, will see certain borrowing in 3.1 a, b and c with regard to the overwrite.

What I have also tried to do is in a sense to deal with questions of concurrency, where there is a conflict there and what one does there. And so, in a sense to deal with conflicting laws and the override in two different ways. Now, obviously, Mr Chairperson, as we discussed with the Court Group, the idea isn't that this matter be finalised here and I understand we are having another meeting on Thursday, and perhaps there will be further deliberation.

10

What I think the attempt is here is that if we can perhaps members could study this so the Technical Advisors can in fact go away at the end of our discussion, not today's, but interim discussions and say, well, yes, most people think's

20

one is all right, but we can put alternatives which could meet the different aspects of members concerns.

At least, by the end of it all, the CA will have some sense of how our debates pan out when we put it down on legislation. So I suspect, what I have done here is to concentrate your minds on how your proposals actually pan out when you reduce them to Constitutional text and really that is what I have attempted to do.

10

So, I suppose in its own way, this is an attempt at some type of compromise and bridging of the various proposals of the parties, which probably satisfies nobody. Perhaps, if it does that, then it is done rather well. What I will welcome is comment and debate once members have had an option is to discuss this, that we as the Technical Advisors, can get some instructions. I haven't really had up till now, as how to prepare this against the alternatives, if necessary. Thank you.

20

**CHAIRPERSON:**

Thank you, Professor Davis. I think, first of all, we must thank the Technical Advisors and you were the typist, apparently. Sandra Haydon, because I know your hand-



writing, no one can read it. So it must have been a group effort. Thank you so much for your trouble.

Ladies and Gentlemen, apparently everyone has received this draft text only today, this morning. Now what is suggested by Professor Davis is that we have a Thursday meeting - Thursday afternoon of the Theme Committee.

That the parties take it and study it and that Thursday we continue the discussion on this draft text and the parties can check whether they want to put in alternatives, but at least this is the type of thing which the Constitutional Committee wants from us together with that summary of contentions and non-contentious issues because they have to be read together. Could I have some discussion and hear your opinions on this matter at this stage.

10

Could I just say - the process of the theme commentary is like this. On Thursday we have a meeting - this afternoon. Next week there will be no CA activities - it will be all devoted to National Assembly and Senate work - Parliamentary work. Then the week after that we have got quite some time available. I have asked Mr Mxenge to send out a letter to us before Thursday giving an idea of the

20

**THEME COMMITTEE 3**  
**12 JUNE 1995**

planning for the next three weeks, so that we can all prepare ourselves to get our programmes in order.

Yes. Could we now come back to Professor Davis' report here and hear your opinions. Shall we take it further on Thursday afternoon? Mr Cronje!

**MR CRONJE:**

Before I talk about Thursday afternoon or the process. This is, I think, a good example of Constitution written in such a way that ordinary people can understand it. Now about Thursday, I would think that we must try and have the meeting in the morning - if at all possible, because the next day is the 16th June and many people would have speaking engagements the next day. I just put it in now for thought.

10

**CHAIRPERSON:**

The problem of course, the Party's caucuses of Thursday morning. It is on the programme like this. This is the things decided by the Whips Comrade Cronje. It stands here that there is party caucuses on Thursday, Theme Committees and Call Groups to convene in afternoon. Details will follows.

20



**THEME COMMITTEE 3  
12 JUNE 1995**

We sit with that thing. We first talked about the date. Shall we make it in the afternoon. We've got no choice. The Whips have talked. If there's more groups of people I want to overthrow you know. These Whips. Comrade, your hand was up there. Ja, or not.

**UNKNOWN:** (inaudible)...

**CHAIRPERSON:** Oh, oh, sorry. Ok, then it will be Thursday number 1. Number 2 shall we deal with this draft text on Thursday afternoon then and look at alternative things and Technical Advisors will also look at it. So far so good. Agreed?

10

Was there any other inputs from the Technical Committee at this stage? Professor Venter.

**PROF VENTER:** Thank you Chairman. I just want to make a remark regarding the two pages which have just been distributed to you.

20

You will probably recognise it as it was part of a report concerning the Constitutional principles dealt with towards the end of March and it is in that report. I would

immediately like to make it clear that Professor Davis and I are not competing here as Draughtsman.

We just thought that it would be a good idea to present different angles of Draughtsmanship. You must also note that pages 7 and 8 were - came at the end of that report which dealt with the Constitutional Principles and it was an attempt at demonstrating how those principles could be put into text. It was not a serious or final attempt at clear and distinct Draughtsmanship.

10

But what is quite important is to see what the different ways could be in which one could deal with the issues like concurrency and exclusiveness. The framework legislation is not dealt with in that draft, but it is intended to be a bit more complete regarding the requirements of the Constitutional Principles.

And what we might attempt to do before Thursday is to see how one can come up with either a joint draft or even more alternatives to give you a better idea of how one could approach this whole matter. The reason why we have these two is that what Professor Davis presented we could not

20



discuss before hand as a Technical Committee. It was done by him and we are quite happy that he did it, but we could not discuss it before. We might have some opportunity to do that before Thursday. Thank you.

**CHAIRPERSON:**

Thank you very much Professor Venter. Now we are refreshed again on this document of Professor Venter.

Professor Venter, there is only one thing which has happened in the time you were away, after you had written this formulations and that is the document on the contentions and contentious issues which we have progressed after much blood and sweat here.

10

Could we perhaps ask, for Thursday's meeting, you look at that document and consider it again against your formulations here and then we can hear you again on Thursday. Is that the right approach or what do you suggest.

20

**PROF DAVIS:**

I think that is fine. I mean we will chat amongst ourselves, but I would suspect parties will go away and do their

THEME COMMITTEE 3  
12 JUNE 1995

homework and on Thursday we can debate these issues more comprehensively.

We can go home and do some more homework once we have heard your debate.

**CHAIRPERSON:**

Thank you. I think you would all agree that it is imperative that the Technical Committee has cleared the text out with each other also - and come on some report on how you find it after some discussion. Is everyone agreed on this. Agreed. Agreed?

10

Are we finished with the part on the draft text now. Okay. Now we can start from the beginning. Professor Davis, you have done everything now. Ladies and Gentlemen, could we come back to our Agenda.

Now we come to the minutes of the Meeting held on 29th May 1995 - pages 2 - 3. I put it before you. It is on pages 2 and 3 of your documentation. One, there was an opening.

20

Two, the minutes of the previous meeting were adopted. Thirdly, we came to matters arising. Firstly, that the report of the Summary of the areas of agreement and contention,



etcetera. It was noted that the PAC had submitted the addendum on this Senate - for inclusion - and I would please advise all the members to go and read that paper, so that you can really see what the PAC stands for.

3.2 - Commission of Provincial Government. Professor Basson further advised us that the addendum to that Report had been completed as per instructions of the call group. That was the Report of recommendations of the Commission of Provincial Government. We received that addendum from the CPG. Its in our general papers.

10

The third one was the question of framework legislation. I gave a few very confused observations and then the Committee agreed that it would be able to give this to the Technical Advisors and - 3.3.3, it was agreed that the distinction between framework legislation and (inaudible)... legislation would be teased out and - 3.3.4 the following issued was not discussed. The relationship between Central Government and Third Tier and the relationship between Second Tier and Local Government, that's actually the question of Inter Governmental Relations.

20

**THEME COMMITTEE 3  
12 JUNE 1995**

Now Professor Venter did a lot of work and he provided a document. We can come back to it just now. Four workshops, harmonising Inter Governmental Relationships which ended at 12.00 o'clock and afternoon the one on financial and fiscal relations was held. Transcripts will be circulated. Those are our minutes.

Firstly, are the minutes in order and a correct reflection. Agreed. Mr Andrews.

10

**MR ANDREW:**

Mr Chairperson, I agree entirely with the procedure of not putting too much detail into the minutes. I do think that in respect of the workshops. It would be useful for future record to mention who the - the names of the persons who gave evidence and their capacities. Such as Mr Matthew Phosa in the morning and some of the people in the afternoon. Just simply their names and who they are.

**CHAIRPERSON:**

Could that be done?

20

**MS HAYDON:**

Can I answer those accordingly. For the sake of these minutes.



CHAIRPERSON:

I think we can give authority to change as an editorial matter by Ms Haydon. Agreed? Other matters. Agreed to the minutes. Correct reflection? Thank you.

Now we come to matters arising from these minutes. Let us just look through those points if we are okay with the minutes as arising. 3.1. - if we look at 3.1 the PAC thing. I don't think there are any problems arising from that. Agreed?

10

3.2 the Commission of Provincial Government. As you have seen, they have now provided as with further documents. This morning in our pigeon holes - they have provided the final word of inter-governmental relations and we are very thankful that they worked so hard to get these documents out. Thank you very much. I think from all of this. Are there any matters arising from 3.2? None?

3.3 Framework legislation. Now, I think at this stage we should request Professor Venter to quickly give us an overview of his very learned document and it simple so that I can also clear up my own confusion of this matter. Professor Venter is that agreed?

20

**PROF VENTER:** Thank you Mr Chairman, the only thing is that I am probably going to confuse you even more if I try to summarise it. This is a summary and since nobody had an opportunity to read it before we could probably quickly go through it.

**CHAIRPERSON:** If you could just introduce it.

**PROF VENTER:** Yes, well, Mr Chairman. If we look at the document, the quality of which is to be contributed to the fact that it is based on a fax. I mean the appearance not the content.

10

What I attempted to do there was firstly to trace the origins of the notion of framework legislation in the first two paragraphs and then I tried to tease out some of the implications for the work that is being done here and some consideration is at the end of the document. Now, the origins are clearly, as far as I could ascertain, only German. It is the German Constitutional Law. I have never found - it might not have - I might not have notice something that should have been noted. I could not find any other system that ever used the notion of framework legislation - Ramen Gazzetze - they call them.

20



It is done in terms of the German Constitution, Section 75 which empowers the Federal Parliament to make. They don't even call it in the text, a framework legislation, but framework regulations, but they have decided that that means basically the same thing. And then specifically list a number of matters on which the Federal Parliament can make framework laws. You have the list there in the first paragraph.

It is made subject to the same limitations, Professor Davis also referred to those limitations just now - that applied to concurrent legislation, which is an indication that framework legislation can be understood as some species of concurrent legislation although this, as I point out later on, has also not been established in German learning.

10

That is the case. Because in paragraph 2 I would point out where the framework legislation should be considered to be a legislative category distinct from concurrent legislation or if it must be understood to be such a form of concurrent legislation, has not been settled. What is, however, generally accepted, is that the competency to adopt framework legislation is more limited than that regarding

20

concurrent legislation. It is a more - it is a reduced form of comparative legislation.

The framework laws are intended to provide guidelines within which the legislators of each of the lender will then make, according to the specific and often different requirements of each detailed legislative provisions.

The framework law is in all respects Federal legislation. In other words, subject also to all the requirements and limitations and everything in the Constitution, concerning Federal Laws. While the detailed provisions are Laws of each 'land'. It is again, to them to say that the filling in Laws by the lender are subject to the Constitutional provisions applying to lender legislation in general. A law is only considered to conform to the description of framework law if it really requires substantial filling in.

10

A Federal Framework Law cannot - would not be a framework law if it attempted to regulate the matter in full and it must not only require it, but must be capable of being filled in by the lender and its purpose really is to define the boundaries in which the lenders are able to complete the

20



Legislative Regulation of the matter. The matter being regulated - is neither completely regulated by the Federation Federal Parliament or by the lender, the two together complete the whole picture.

Framework Law is not supposed to be more than that. This, however, does not mean that the framework law must be limited merely to fundamental principles. It can go slightly beyond and that is the area when things become technically difficult to exactly define where Framework law goes too far or does not go far enough. In German Law that is all contentious.

10

Now Constitutional Principle 19 of our Constitution requires the new Constitution text to provide for exclusive and concurrent competencies. This principle cannot be understood either. I would suggest to require the inclusion in the Constitution of the competency to make Framework legislation Law. Nor is the possibility excluded. In other words it is open - it can be done, but it need not be done. Being a reduced form of concurrent legislative competency, however. Framework Legislation, can to my mind, not be used to fully satisfy the requirements of principle 19.

20

If framework legislation were to be the only form of concurrent Legislation. I think that might be problematic for the certification of the Constitution. Should it, therefore, the Constitutional Assembly consider using the concept it will have to be an additional mechanism complimentary to the required exclusive and required competencies. The German example of framework legislation may be very useful for the interpretation of principle 24 where the word framework is used in connection with Local Government, but that is just incidental.

10

Paragraph 5 direct application of the German concept of framework legislation in South Africa might also be a bit problematic because the way in which the German constitution is frames is the opposite to what we have at the moment in the present constitution. The prevalence is or the prevalence rule applies to federal laws whereas the present Constitution puts prevalence on the Provincial Laws.

I also mentioned there the fact that the Swiss also considered employing this notion, but have rejected it on the assumption that the mechanism will result in the systematic reduction of the competencies of the Cantons in favour of

20



the Federation. Framework legislation must be distinguished, that also the point from the minutes, from empowering legislation. If one thinks of it very deeply, it seems to be very similar, but it is not, it is completely different.

Empowering legislation we know very well, where parliamentary enactment law empowers some Executive official like the President or a Minister or whosoever to make subordinate regulations by means of Proclamations and so on. Framework legislation goes beyond that because the laws in Germany of the lender made in pursuance of the Federal Framework Law are original lender Laws applying independently from although necessarily in conformity with Framework Law. A few considerations then, if the notion of Framework Legislation is to be used in the new Constitutional Text, it is advisable to provide clearly in South African terms what it should mean here because there is no indisputable universal meaning that can be attached to the concept.

10

20

Even in Germany differences in expert opinion regarding various of its aspects are prevalent. The point here,

Chairman, is that if our Constitution simply used the word Framework Legislation, its going to cause long debates and probably a lot of litigation. It should be made clear exactly what is intended. It does not appear to be advisable to utilise the notion either to diminish the overall scope of the legislative initiative either exclusive or comparent which the Provinces do have nor to increase it. I sometimes get the impression that the debate focuses on Framework Legislation in order to do either one of these two things. Either to diminish or to increase. If that were the case, I think this is not an appropriate mechanism to do it with.

10

Framework Legislation is a practical mechanism by means of which National Guidance can be given to Provinces and complex fields of Legislation without infringing upon their Provincial Legislative Executive or Administrative autonomy. One of many options and there are more which I think has been mentioned by some of the parties in their submissions. Here are two further ones. One could be to empower Parliament to make laws on matters not falling within the competencies of the Provinces. For example, within the exclusive area of - of the Parliament and I think that is

20



more or less suggested by Professor Davis' draft just now.

Then requiring the Provincial Legislatures to legislate the execution and administration of such matters on an urgency basis for the Government. This is one possibility. Another option would be in view of the fact of clarity surrounding the concept. Not to employ the Framework Legislation at all. In order to avoid legal uncertainty in an area already charged with political constitutional conflict - potential constitutional conflict.

10

From a purely technical point of view, I would say that would be very safe to avoid Framework Legislation because of the Technical complication that it can bring about.

Thank you.

**CHAIRPERSON:**

Thank you very much Professor Venter, for this most - clear memorandum. We will have to study it of course and I will allow discussion. Could I just at this stage to congratulate the members, if I may be allowed from this side. For how well everyone has represented here. It is only the IFP which is not here and the Freedom Front we have been missing a lot. I think we must discuss the Volkstaat concept now, but

20

you know the ANC, I have noticed, is 100% present. I think the National Party is 100% present.

The DP is also 100%. You have only got two members. Have you. Ja. My congratulations. Before I give this one up for discussion, I must just ask Professor Venter just for clarity sake and for example sake.

Don't we already know how Framework Legislation is in South Africa. Look at Chapter 10 of the present interim Constitution of the local Government. Isn't the Constitution Principles, itself, in the nature of Framework Legislation.

10

UNKNOWN:

Vaguely, yes, but in the first place concerning Chapter 10 concerning Local Government as everybody knows. As far as I know that has not been implemented yet and that is why I mentioned here that in the realisation of the Constitutional principle relating to Local Government.

What the Germans do and what they mean with Framework Legislation could help in the interpretation of that principle, but to the best of my knowledge there is no real example of Framework Legislation in existence in South African Law at

20



this stage, but the possibility has been opened by the Principle and by Chapter 10 which, let me just explain this, the Chapter 10 and the Principles says that there should be or there can be - or can be a National Law which establishes the framework in which local government should function on a National basis.

In other words, broad framework. The Constitution already does so by providing some of those basic principles and Provincial Law can then go beyond that fill it in. But one should be careful not to make the comparison too close regarding the German system because I think that was the original approach - the intention.

10

**CHAIRPERSON:**

Thank you very much. Honourable members let me just see the hands. We will first give the smallest party a chance. Ms de Lille, then the second smallest party or the more small party DP and then Salie Manie of the People there. Who represents the people. Then Ms Coetzee. Did I see all the hands. Ms de Lille.

20

**MS DE LILLE:**

Thank you Chairperson. I just want to find out from Professor Venter. Looking at the Constitutional principle

19 and requires the new Constitutional text to provide for exclusive and concurrent competencies. I can remember that we have already agreed on what is going to be exclusive powers in the Provinces.

Now, for example, if we agree on what powers will be exclusive to Provinces. Is it possible that National Central Government then provide the framework for that exclusive competencies for Provinces and then the Provinces must then fill in the detail for execution and administration.

10

**PROF VENTER:**

Yes Chairman, I think my answer to that would be that a redefinition of a notion of Framework Legislation. It would be very different from the German example. Because the German example of Framework legislation concerns matters of concurrent concern and not of exclusive concern to either the National or the Provincial levels.

Therefore, that would go beyond what I think would ordinarily be understood, at least in Germany, under Framework Legislation.

20

**CHAIRPERSON:**

Mr Andrew.



MR ANDREW:

Thank you, yes I would like to ask Professor Venter. I would just like to get clear. The kind of difficulty to the complications that are set out herewith Framework Legislation. To what extent is it the terminology as such or is it the whole concept. In other words - you know presumably one can have conditional enabling legislation and you could have conditional or empowering legislation, which both - particularly conditional enabling legislation tends to get somewhat similar to what Framework Legislation might be.

10

I would just like your - in other words, I am not trying to play around with words, but in the end, Constitutions are words. Is it the whole concept of even trying to achieve Legislation at one level which provides a framework in which other levels can legislate. Or is it simply the use of the word Framework Legislation as opposed to some other better descriptive or guideline legislation or whatever may or may not be easier.

20

CHAIRPERSON:

Professor.

PROF VENTER:

Chairman yes, As I see it, the basic problem. Notional problem with framework Legislation would be that it would introduce another area of uncertainty regarding the boundaries of how far Parliament can go and where the Provincial Legislators must or may pick it up. It introduces the question - when is Framework Legislation - when is a Law Framework Legislation and when does it go beyond that.

In other words - it creates another area of potential conflict. 10  
It differs fundamentally from enabling legislation in that - when you have enabling legislation in the Parliamentary laws empowers specific organs of government to naturally within the confines of the enabling law to make provisions, normally by means of Regulations and so on. But those are not considered to be original Laws. They are dealt with technically in a legal sense in a specific manner.

It - it raises the question such as ultra virus and exactly what the intention of the enabling measure was and it is not 20  
intended ...



MR ANDREW:

May I ask a specific example. Sort of 15 years ago, you had a, whatever exactly it was called, but it was a National Education Policy Act. Now a Provincial Council could make provincial ordinances on education, but they had to be within that framework. Now, I am not sure if you are saying that was in fact was an override as opposed to a Framework.

In the context that we were doing at that time. My impression was that it was a framework - except certain parameters and limits, but within those parameters and limits the Province could make it own education ordinance. Would that - you see we don't have those particular laws in front us. I have not read it for 15 years anyway. Would that not be what amounted to Framework Legislation.

10

PROF VENTER:

There is a similarity there.

CHAIRPERSON:

Now another one of National Education being put in that. It seems to be a correct argument.

20

PROF VENTER:

There is a similarity there, but one should be careful not to take the notion of a Framework - a legislative Framework too far because in that sense the Constitution is as

framework for everything that is being done legislatively and otherwise. It establishes the limits.

I don't remember or know those details or laws at the time, but it's one thing to have basic Policy - approach being prescribed by a Parliamentary Law which may not be contravened by the other legislations. But it is another thing to have a Parliamentary Law drafted with a specific purpose of creating this framework within which different entities - Provinces in this can deal with indifferent ways.

10

I think that is possibly the positive side of Framework Legislation. It neither at the National nor the Provincial level attempts to cover the complete area and it allows the Provinces to have different approaches within the confines of the law. But the Parliamentary Act, the Framework Act is not supposed really to penetrate the whole area and make provisions directly applicable to each and every aspect which is being dealt with. Although the Germans have made provision for the possibility of direct application in some clearly defined circumstances.

20



CHAIRPERSON:

Thank you very much. Before I give the floor to the People's Representative, the Honourable Manie. Just I just observe, as a matter of fact that in Germany the Framework Legislation on University Education has a lot of problems and Mr Andrew will be interested in this, because the Universities because the finances that went with the Applications on creating the legislative structures in Germany was not at the same time arranged. Mr Manie.

MR MANIE:

Chairperson. Thank you. I just want to say about what is contained in the current Constitution. What is an example for me, is in fact is an area covering local government. And also the local Government transition Act. It does not spell out all the necessary detail, but it does give an overall framework within which the Provinces must manage the transition at local Government Level. The details of that is managed at Provincial level.

10

Now, I don't know - in my view, I think although the Constitution sets a framework and the overall parameters, there are instances where the Constitution would be very specific. It would in fact cover the detail where one wants that to be entrenched at that level.

20

**THEME COMMITTEE 3  
12 JUNE 1995**

In my view the area around 1 - 6 would almost necessitate all the functions that are housed concurrently between the Provinces and the national would require some kind of overall framework to cover those things that's mentioned in 1 - 6 like norms and standards and so on. Otherwise if you don't have that, it means that people would go as far as they want to and then it would have to be tested.

So the more realistic way of looking at Framework Legislation would be to say where there is a concurrency between the National and the Province that National should come out with some sort of overall framework, in fact exactly as it says - framework and perimeters in which that must operate without necessarily going into the substance of what should actually be done. These are certainly my views around that.

10

It should not be something for you to wait for it to happen and then you come up with national stuff.

20

**CHAIRPERSON:**

(inaudible)... this time. That was a statement of the way the ANC is seeing it as a Political Party. Could the PAC just



write just. We give the National Party a chance \*\*\* follow up on the present discussion.

**MS DE LILLE:**

It is a follow up on the present discussion. Can I ask Professor Venter. If you need Constitutional Principle 19 subject to Constitutional Principle 21.4 - what do you come up with because 21.4 refers to uniformity and the predominantly National Government shall override there.

**PROF VENTER:**

Chairman, I think there is a danger of confusing the idea of what's popular being called overrides with Framework Legislation. I am looking at it from a technical point of view. The idea of principle 19 - the powers and functions of the National Provincial Levels of Government - no - yes - that one about exclusive and concurrent powers and then comparing that with 21.4 where the uniformity across the Nation is required for a particular function the legislative power that action should be allocated predominantly if not wholly to the National Government.

10

20

The issue which these principles address is not whether there should be crosses where the Parliament should provide a general law which deals with principles or standards and

minimum things. That must be there, but it cannot be resolved by saying that all these things are framework laws and that framework laws can deal with anything - if you are following what I am saying.

The need for national norms and standard by and is provided for by parliamentary legislation is there, but there approach of the present Constitution and the principles says that that does not cover everything. There must be areas where Parliament or Parliamentary legislation does not penetrate where, in other words - the Provinces will have exclusive power to legislate and to administer matters. Also seeing some of the parties submissions is really that framework legislation might be used to overcome the idea of exclusive powers for the Provinces and

10

I really don't think that that would be consistent with the Constitutional principles.

**CHAIRPERSON:**

Thank you. Professor Davis also addressed those problems in his address. I made a fault unfortunately, Ms Coetzee's was up previously.

20



**MS COETZEE:**

My question is actually to Professor Davis and Professor Venter. I would like to understand the German terms of Framework legislation and they actually wants - that the Framework in our context should specify the powers and functions of Provincial Government and Local Government because why as they say here that context of Framework Legislation should be of use in determining what the Constitution should and should not contain regarding local government, so I would like to have clarity there.

10

The German context - do they want specification on the powers and functions of the 2 lower level of Governments.

**PROF VENTER:**

The only reason I mentioned the principle concerning local government. Principle 24 in paragraph 4, Chairman, was that after having taken note of what Framework Legislation means in the German context. It might be easier to understand what principle 24 should mean.

How that could be interpreted. The framework for local government powers, functions shall be set out in the Constitution. The Constitutional Court must decide whether the Constitutional text with which the assembly comes up

20

with conforms with this principle. It would probably have to consider if the Constitution does that, provide a framework for local government powers and then it would be of some assistance to take note of the meaning of the word Framework.

Legislation in the German Constitution. But a more specific answer to your question would be the idea of Framework Legislation in the German context is not that those Framework Laws allocate powers to Provincial or Local Government. That is actually done in the Constitution by saying on which issues the Federal Parliament can make laws providing frameworks in which the Provincial authorities can make their laws.

10

**CHAIRPERSON:**

Thank you. Could I then request the National Party to put the last question on this matter. We have spent considerable time on this. (inaudible)... let me just get this right. Mr Cronje, you will also would like to ask a question. That would then be the last one. A clarity question. Please.

20

**UNKNOWN:**

Mr Chairman, if we presumed that the portion that appears in the draft text of Professor Davis 2.2 appears in the



Constitution as it stands. It will read then: "A Provincial Legislation shall have the exclusive companionce to legislate on all matters related to (a) the function areas specified in Schedule 1. If that appears in the Constitution at local government is a schedule 1 matter.

Could I be advised, Sir, whether, if that is so, whether further legislation is then desirable to appear in the National Constitution to framework as you may. Local Government in the Provincial Constitution.

10

**PROF VENTER:**

Chairman, yes, Constitutional Principle 24 requires the Constitution to contain such a framework and I don't think it would be sufficient for the Constitution to say that local government is a Provincial matter. The framework has to be provided for.

As I remember it, the original idea with this principle and even with Chapter 10 was that local government should be dealt with at 3 levels - broad Constitutional framework - implementation by means of Parliamentary and Provincial Legislation and then at the local level - the rest is done.

20

**CHAIRPERSON:** Satisfied. Mr Cronje.

**MR CRONJE:** Ja. This in the document on page 8. Professor, there on 2 occasions, subsection 4 and 5 of Section 125 that's the third line and again third line from the bottom. I presume you are talking of Section 1 to 6.

**PROF VENTER:** Sorry, Chairman, I could not quite follow because I looked at a different paper now. Is this page 8. The last text.

10

**MR CRONJE:** Ja, page 8. Third line. Third line from the bottom. Subsection 4 and 6 of Section 1 - 6 it should read, I presume.

**PROF VENTER:** No, Chairman. This draft, you must look on page 7. There is draft for clause 125. That is ...

**MR CRONJE:** Not in the interim Constitution.

**PROF VENTER:** No, no.

20

**MR CRONJE:** Oh, in your sequence of things. Okay sorry.



**CHAIRPERSON:** You've got it right now Mr Cronje?

**MR CRONJE:** Mr Manie referred to it now. I mean that whole page 8 in the real Constitution 126. I mean it spells out those things when Parliament can in fact overrule scheduled things. But only once something has happened. Now, I think we also have Mr Manie saying. It is possible, in terms of this for Parliament to pro actively say something about it. Where is it to be decided.

10

**PROF VENTER:** If I understand it correctly, Mr Chairman, the - lets just look at what the present Constitution says, 126. Parliament can make a law on all the matter within the provincial competence in the schedule and nothing will happen regarding those Laws. They will be fine. Until a Province makes a law on the same issue. And then the question arises if there is a clash between the Provincial and Parliamentary Law, which one will prevail.

And that is what 126, three deals with. And that is where the meaning of concurrency and exclusivity actually comes in without being mentioned expressly in the Constitution. What is probably being called overrides will then determine

20

whether the active Parliament conforms to those criteria. And if it does, it will prevail, if it does not, the Provincial Law will prevail.

CHAIRPERSON:

Thank you Professor Venter. That concludes our work on the frame. The next work on the Agenda. That was matters arising. That is finished now, now we are on a point called rapport, the area of rapport refers to the areas of agreement and contention. The report of the 5th June.

10

Could I, at this stage, perhaps say, thank you to Professor Deon Basson because at the time when some of the other experts were busy with other tasks, he had to carry a large burden of this document. Thank you very finished. We have finalised. We have agreed on it. Is there is anything else at this point? The draft text is now - hierdie Engels, Man - dit kom nie vandag nie. Of this summary.

Agreed? Nothing to be said on it? Then we come to the point. Pardon. General. Any points under the general you want to raise? None? Then we come to point 7. I declare this meeting closed. Could the ANC component please stay

20



**THEME COMMITTEE 3  
12 JUNE 1995**

behind for a moment. The other people must leave because  
we are going to talk serious business.

**[ END ]**

10

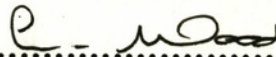
**TRANSCRIBER'S CERTIFICATE**

I, the undersigned, hereby certify that in so far as it is audible, the foregoing is a true and correct transcription of the proceedings recorded by means of a mechanical recording of the:

**THE CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3**

**12 JUNE 1995**



.....  
**TRANSCRIPTIONIST: S COLEMAN**



.....  
**EDITOR: H POTGIETER**