

# **CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

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**VENUE:**

**GOOD HOPE CAUCUS ROOM**

**WORKSHOP:**

2/4/3/9/9

**PROF BREYTENBACH:** (inaudible) ... an analysis that it did happen mostly where there was a group that coincided with territory. Certainly that is the case in Belgium and in Tanzania and so on but there is one exception to that rule and that is Nigeria, where there has been a gradual federalisation since 1960 onwards when it had only three regions and the Nigerians are now 32 regions.

They have gradually federalised simply for the sake of making the system more efficient and keeping it all together. 10  
So Nigeria perhaps does not fit the rule there but the general pattern is exactly your observation and then on terms of the RDP, RDP is being made by Mr Naidoo and other people who came the normative, you know, the National Economic Forum etc. etc. and from the, you know, the golden triangle between labour enterprise and government.

So it is a central government policy statement but it is stated in the RDP and I fully subscribe to that, that delivery of the 20 RDP, finances will come from central government to a very large extent in the in between but at the end of the day

delivery has got to be decentralised to provincial and to municipal levels. So until and unless we have up and running provincial and local governments the RDP delivery will suffer on the ground.

MR CARRIM:

(inaudible) ... say in what form, I mean you can have decentralisation in a unitary form and it could take a federal form, so I mean there is no necessary implication to what is there in the RDP document because we can state, in fact one could argue the reverse that in order to implement the RDP and precisely because the national strategy that in so far as we are speaking of decentralisation, it is in the context of a relatively central form of state rather than one that is evolving power substantially to local and provincial levels. 10

PROF BREYTENBACH:

Just remember we are not as tiny as Belgium or all these countries. We are a big place and therefore simply for the purposes, if there were no other principle involved then at least for the sake of efficiency and effectiveness and capacity, one has got to think of that kind of structure that can deliver closer to the people and then whether we have official federalism or not. 20

One would at least then need to have a very decentralised form of unitarianism at least for the sake of delivery but within a unitary state this happens by agency or by delegation which is not a right, it is a prerogative of the central government to make these powers available to the lower levels and this could destabilise continuity and expectations for the people on ground. So I would still argue that if one thinks in terms of delivery on the ground that one moves as close to the people as possible.

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MR HUMPHRIES:

Mr Carrim, I think I would probably tend to agree with you that it is a trend, on reflection it is a trend towards regionalism rather than federalism in a sense. I mean, I think Belgium it is generally agreed is now a relatively or almost a federal state. Spain and Italy which are other examples of regionous states, I do not think one can call Spain properly federal yet or even Italy but you know, time will tell, I mean in a sense we do not know, you know.

Constitutions and political systems evolve over time but a more interesting lead, the issue about economic development. I think if one looks at federal states in the

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world they do probably as a generalisation have one issue in common.

They tend to be big states, which I think Willie has already said. They also tend to be relatively wealthy economic countries, US, Canada, Australia and so on but they are not characterised by economic cleavages (a) between regions which we are and they are also not characterised by severe income inequalities within them which we are, and in a sense that makes the issue of federalism and the prospects 10 for the success of federalism in our country, fully fledged federalism.

Those two issues are issues which have to be taken into account. I mean I personally would admit that my sympathies lie between regionalism and federalism but I would also have to admit to myself that our severe economic and geographical income cleavages where Gauteng produces something like, you know, 45% of South Africa's gross geographic product, is a severely constraining feature on any 20 federal model were we to adopt a federal model. It remains one, and racial cleavages so unless one finds ways of

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counteracting those and they are not going to be found overnight, it would seem to me if one was to get into personal preferences that proponents of federalism should take those two issues into account.

**CHAIRPERSON:**

We have got ten minutes. Let me just give the next three speakers but can we all try and be perhaps as brief as possible. It is Mr Andrew, Ms Maree and Ms Coetzee.

**MR ANDREW:**

If I might just make a brief comment on the previous 10 answer, you know, on the list and mentioned here today have been cases like India, Nigeria and Brazil which are not uniformly wealthy countries which have very strong federal features and I would suggest that places like in particular Italy, taking the more western developed countries, there are massive discrepancies between the standard of living in the region between the north of Italy and the south of Italy for example. So I think one has got to be, I know it is very difficult in trying to be brief, not to over-simplify sometimes but I mean that I think that one really does have to search 20 through.

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The question I wish to ask is, and it partly ties up with Eunice's question and the point made that one is looking for a Constitution that works and one of the dimensions obviously, while a Constitution is not going to do everything and there will be examples and exceptions, that one of the things you want to try and do is facilitate economic development for the purposes of higher quality of living of all the people.

Now in terms of the panellists' international experience and 10 knowledge of these various systems which is obviously extensive, may I ask, is it entirely co-incidental that if you take the countries that happen to be mentioned there and with the possible exception of India which is the (inaudible) ... probably generally call western countries and India is in that sense a different category. Is it entirely co-incidental that the average standard of living of the people of those countries goes up consistently as you move to the right, or is that entirely co-incidental or is it from if you were taking a broader sample of countries, would there be any 20 correlation or does it just happen to be that those ones work?

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Now I can see there is something that very agitated is they have secured their own quality of living in the central government but I am concerned about other people's quality of living as well.

UNKNOWN: Turn it the other way around.

MR ANDREW: Well have a look.

CHAIRPERSON: Sorry guys, can we have one meeting? 10

UNKNOWN: Mr Chairman, in response to Ken Andrew, I do not, just to respond to him, to his response to my response, I do not think Nigeria is a federal state. I mean military rule has ruled it out of the federal game. It has elements, its society is federal I would agree but I do not think that one could say that Nigeria in terms of this government, characterise, qualifies as a federal state simply because of its long basis of continued military rule. On India I agree, I agree with that. 20

Brazil, I mean I have just come back from Brazil and one of



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the issues that people tell you there in Brazil is they warn about the dangers of vesting extreme economic and revenue powers in the provinces because Brazil today is characterised by situations where the new president who happens for his sins to have been a noted sociologist years ago on the left, now has to deal with the situation where the provinces have such strong revenue raising powers that the central government cannot do, can do very little to overcome the severe economic crisis in Brazil, unless it takes revenue raising powers away from the provinces. Now this 10 is an argument about the dangers of perhaps vesting too much. We perhaps vest too little but I mean that is an argument.

Italy I concede but Italy does have the position where it does not have severe racial inequalities but I agree between north and south thereof. As to that, I was not responsible for putting that up but I think historical explanations as to why some countries are wealthy and others are not, is an extremely detailed issue and I do not feel competent to deal 20 with it. I do not think it is simply related to their form of government. I think it - but ja ...

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**UNKNOWN:** (inaudible) ... high standard of living compared with Canada or the United States or Germany (inaudible) ... No but it is a - I said with the exception of India if you were listening.

**CHAIRPERSON:** Sorry, let us carry on.

**PROF BREYTENBACH:** Ja, this is an esoteric debate but it is interesting because it does concentrate to mind of the seven of the seven G seven countries. Japan is a highly unitary state and it is one of the top seven richest ones and then obviously France and 10 Britain that are unitary, also rate amongst the top seven richest ones but then all the rest, all the rest being on the more federal side of the spectrum, as far as, ja Nigeria has been an interesting one.

Military rule simply neutralised the civilian structures but even despite the fact that Nigeria has been under civilian rule since 1960 when it became independent, it is now 35 years, it has been under civilian rule for only seven years but despite the fact that almost for 30 years it has been under 20 military rule, even the military rulers actually governed the country on the basis of federal principles, working through

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the state governments and the governors albeit appointed, not elected but they worked through nominal federal structures.

I am not aware of what is happening in Brazil but then certainly definitely India, India is perhaps one of the shining examples of a big and relatively poor in terms of per capita income, far below us, 250 dollars per capita and it is a working democracy and there are people who say that if, in the case of India one can say this quite bluntly, is that India 10 would have probably not survived as a democracy if it were not for federalist type of structures that they do have.

So it is an example of a, not only democracy in the third world but at the same time also with a footnote, federal type of democracy in the third world. If it were not a democracy then it might have been a different kettle of fish. It might not have been a federalism, it might have been a different kettle of fish.

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**CHAIRPERSON:**

Mr Maree?

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MR MAREE:

Mr Chairman, I would like to know, should the degree of sophistication, population in a country (inaudible) ... be a factor in a sense where on that continuing line its Constitution should ideally be pitched.

PROF BREYTENBACH:

I guess if one looks at what you refer to as levels of sophistication, that is highly subjective and it is almost not a single yardstick that can measure that, but if that be the case then it would mean that asymmetry would be the answer, whether it is an asymmetrical union or an 10 asymmetrical federation, that it has got to be asymmetrical so that one can allow for more autonomy in some cases and less autonomy in other cases, irrespective of whether it is unitary or whether it is federal.

So if one does acknowledge there is diversity as Mr Gordhan and I had our discussion, if we do agree that there is diversity then I would say from that point of view, the point of departure ought to be isometry within whatever other system. But then it has got to be, needs, two 20 provinces need not to be exactly uniform in terms of what they have and what they can do.

UNKNOWN: (inaudible) ... or what do we base the term "sophistication" on? What do we mean by "sophistication?"

PROF BREYTENBACH: Being able to read and write and all those things.

CHAIRPERSON: Ms Coetzee?

MS COETZEE: My question actually is about this subsidiarity. What effect will it have on local government in the unitary state, local government and unitary local government because in the 10 past we can call it, we are from a Federal State whereby the localities was divided and the (inaudible) ... divided that is why we got (inaudible) ...

UNKNOWN: (inaudible) ...

UNKNOWN: Can I answer that one? I think we will return to this in detail and in depth when we assemble once again but let me just make the point that, just in passing, subsidiarity in church law, it is begin at the parish "Die laagste punt 20 boontoe" but in Constitutional law the examples that I have come across, for instance where subsidiarity does exist as in

the German case, it is actually pegged at the "lander" level, at the provincial level, not at the municipal level.

So it is pegged at that level so it would seem to me that if one deduced from what is the modern practice elsewhere, that subsidiarity in Constitutional matters begins from the middle level upwards, whereas in church matters it begins from the "gemeente" from the parish level upwards and the principle there simply is, is that level ought to do as many things as possible, unless it cannot do so because of lack of 10 capacity, lack of efficiency or effectiveness, then it can be devolved upwards.

I am not so sure if one can devolve upwards but then it cannot be delegated upwards. Then it should go upwards so then eventually in terms of subsidiarity, what ends us up right at the top ought to be those powers that could not have been dealt with by lower levels, therefore residuality then also comes into this whole thing but we shall return after the break to this very complicated inter-linkage 20 between subsidiarity on the one hand and for instance residual powers on the other hand. They are related but

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they are not actually related. We will explain that later on.

**CHAIRPERSON:**

Colleagues it is 12 o'clock. We have run out of five speakers. We obviously cannot pursue this questioning and any further discussion. I am not sure if we are moving immediately onto the next stage or if we are having a five minute exercise. Shall we do that. We re-convene in exactly five minutes please.

**MEETING ADJOURN**

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**ON RESUMPTION:**

**UNKNOWN:**

We will start now please. Friends, in this second session what we are seeking to do is to be more inter-active, so the idea is that we will go through each of the concepts that you have in your programme and both the speakers will comment briefly and then we will take questions. The idea is to allocate about five to eight minutes to each concept and to some extent we have dealt with the first two concepts so perhaps we will give that less time than the other 20 concepts but to start then with subsidiarity. Okay, Willie will go first on subsidiarity. No, I think people had

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questions to pose, so if we could please, we start with subsidiarity.

**PROF BREYTENBACH:** Yes, subsidiarity, I have already dealt with that problem. If you look at this page of my document, item number 3, this one that has the pyramid right at the top under Key Concepts, that in a nutshell is my definition of subsidiarity.

It is contrasted with Central Prerogative, so whether is Central Prerogative, namely that the centre should always 10 prevail over the lower levels, clearly that is the opposite of subsidiarity. These are mutually exclusive and subsidiarity is also, although in a softer way, it is also mutually exclusive with co-determination or concurrency.

Co-determination means "gesamentlike besluitneming" joint decision making. Concurrency also means that this level and that level depending on x y z criteria may or may not exercise powers but with subsidiarity it is quite clear. It is the opposite of these, particularly opposite of central 20 prerogative, namely its local prerogative. Here local means lowest. As I said, in church history, local means the parish



and in Constitutional law, as far as I can ascertain, it means the middle level upwards. In the case of Germany where this is a live and well concept, it is from the level of their provinces which they call "lender" German "land." It is from the "land" upwards so subsidiarity should mean that the lower level should prevail over the other one, that is my definition of subsidiarity.

MR HUMPHRIES:

I tend to agree with Willie, I mean obviously from a side a think of the Unitary and the Regionous State to the extent 10 that subsidiarity points to empowering the bottom first or just empowering the bottom, you know, lower tiers of government where possible.

In a Unitary State subsidiarity would have some lessons in the sense that it need not imply that local government in a Unitary State should be weak but that, you know, one could in a Unitary State have strong local governments and that one vest a whole range of functions in local governments in a Unitary State. Not necessarily drawing on subsidiarity but, 20 you know, applying some of the, you know, the essence of return.

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I am not so sure about the German model, simply because we have been doing some work at CPS with the German funder on small business issues and inter-governmental relations around small business issues. I asked the German expert who came out for this project, you know, how they understood subsidiarity and he immediately said it begins at a sub-municipal level.

So you know, whether there is debate in Germany around where subsidiarity starts, you know, I am not sure but it was just interesting that he said it started at the sub-municipal level then goes to municipal level, then goes to the provincial level or to the lander level. 10

**CHAIRPERSON:** Questions? Raymond?

**RAYMOND:** I just want to raise a comment about this. Can I do that?

**CHAIRPERSON:** Certainly, yes.

**RAYMOND:** ... (Inaudible) in the spirit of inter-activeness. Earlier in this discussion mention was made of the need for us to develop

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Constitutional principles and give the label afterwards. Now one of the problems that I have with concepts like subsidiarity, it is being advanced as a principle in contrast even to effectiveness. We have seen in some of the documentation placed before us that subsidiarity praises the advantages of devolving powers to the lowest possible level even if that is not the most effective level for exercising it.

Now if it is not necessarily the most effective way of exercising it, in a sense we are pledging ourselves to the possibility of disempowering ourselves by saying that the lowest level is inevitably the best level even though it is not necessarily the most effective way of doing it. So what we are saying is, small is so beautiful that we should be willing to deprive ourselves of benefits that could be achieved by doing it at the higher level. 10

So I want to put it to this meeting, this is an extremely dogmatic and ideological approach which I think we need to guard against and rather stick by the approach of choosing the most beneficial way of doing things and give the label afterwards whether it is subsidiarity or what have you. 20

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CHAIRPERSON: Comments?

UNKNOWN: I think it is a little bit, put it too extreme, stating that subsidiarity may result even against efficiency. Subsidiarity is for me maybe a political thinking. Now democracy at the lowest level, the community based type of decision making but at the same time you can see together with from a point of view of management. Managements, at times I taught management for many years. The most efficient system is to have decentralised proper centres. That is more efficient. 10

If you take it from an economic point of view, decentralised decision making definitely leads to more efficiency. There it is a question of accountability to take it down. It is better in smaller units so I agree we must be careful not to see it through glasses of, as an ideological approach. I think we must all look for the best approach but maybe the best word is to talk about decentralised decision making because we all can agree on that. It is from all points of view economic politically management. It is a good system. 20

UNKNOWN: Can I clarify it?

UNKNOWN:

(Inaudible) ... if it is the most effective way of doing it then that level is the best way of doing it, so that if I remember the other side is arguing that the local is the most beneficial and it can be shown to be. Well then I find that quite acceptable but in one of the documents last week it was said "it is better to devolve to the local level even if it is not the most effective."

So a lot of what was said about management is, I think men will concede that in some situations a centralised decision may be better even in a management situation, in some 10 situations. So what one has got to ask oneself is, what is the most effective way, it may be local but it may be in 5%, 10% who knows what the case is.

UNKNOWN:

The gentleman that, when it comes to economies of scale, spill-overs, then you have to take it higher up and then you cannot then switch it down to the lowest level. There are economic factors, again on the other side of efficiency where you have to do it from a high level, so I do not think we disagree. 20

CHAIRPERSON:

Okay (inaudible) ... Praveen and then Peter and Dennis

Davis. May I just point out that the technical experts are fully free to engage and we are very keen to hear so please do participate. So it is Praveen and then Peter and then Dennis.

**PRAVEEN:**

(Inaudible) ... of what Raymond Sunter was trying to say is that let us be concrete about and not ideologically driven about some of the concepts that we want to use. The problem with what Doctor Marais is saying, is that for example to say it is all decision making or the best decision 10 making can take place at a local level, is that again it over-simplifies and over-generalises.

I would rather suggest that in our situation we should be concrete, we should be pragmatic and we should be flexible, and by that I mean it will be foolish of us to deny that, or rather to suggest that if we have a highly centralised system, a cabinet minister is going to decide how refuse is going to be collected on a particular street. Quite clearly under all systems decisions are taken at all levels. 20

What we need to have sure in designing our system is that

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the most practical, efficient and effective things are done at a level where it is most suitable and if we approach it in that kind of way, decisions will be lodged at all levels, power will be lodged at all levels and where it is appropriate there will be a weighting towards the one side or the other side, depending on what the circumstances required today, five years hence circumstances might quite well require something else, and if it requires that then flexibility demands that we change in that direction. If we are ideologically driven then we will go into vast generalisations 10 and it will not be too helpful in our debate in the (inaudible) ... process.

**CHAIRPERSON:**

Peter?

**MR SMITH:**

Sure, I actually beg to differ in that regard. As a Theme Committee our function is to process sufficient, not necessarily to reach consensus on what things mean or should mean. So to the extent to which we are trying to engage in a common understanding of what subsidiarity 20 should be, that is a bitter red herring because I think Mr Sunter's comments earlier on an ideologically driven

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approach, I think that he is actually referring to our submission which states, and I will not quote the whole thing, but one sentence "that the principle requires that powers be allocated to the lowest level of government capable of exercising them even if such allocation is not the most efficient solution" and that is correct.

That is the view we hold and I think the purpose of this exercise from our point of view at least, is that we get understanding, that there are different views of what 10 subsidiarity actually comprises, but in terms of a party making a submission to the CA process, this is the position we have adopted and will continue to adopt. Thank you.

**CHAIRPERSON:**

Dennis?

**PROF DAVIS:**

Yes I do not want to get involved in your debate (inaudible) ... in relation to the comparative background but I think it is not unimportant. The tension between, if you want to call it efficiency, national goals, national reconciliation on the 20 one hand and local democracy on the other, goes through every single federal structure that was put up on the board

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and it is not necessarily helpful to categorise in this very neat way for the simple reason that when you look at what the courts do, now I accept the need to make the anti (inaudible) ... remark that the court is not everything but it is very interesting to me that in countries for example such as the United States of America which is regarded as a much tougher form of federalism more on the right-hand side than some of others.

The tendency of the American Supreme Court has been to 10 use the inter-state commerce clause to override provincial powers increasingly. If you go through the same thing in Germany, the German Supreme Court, the German Constitutional Court, the Australians, the Canadians, there is a tendency notwithstanding the political impetus for federalism for there to be a (inaudible) ... prudence which builds up which concentrates considerable powers at the centre through the Courts.

Now you can argue about that, you can say that is right or 20 wrong but that is the fact, that is what happens. Therefore I think that to a large degree the term subsidiarity is

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Constitutionally, technically, an unhelpful terms because to a large degree if it is meant to imply that in fact, there are powers which are utterly immune from any form of override then that does not occur in any single federal society. It might possibly do so in confederal societies who are, interestingly enough there is a great dispute as to whether that even occurs in Switzerland.

Now that does not necessarily mean you do not have to try to develop some indigenous model here but I think it is 10 important to bear in mind the background that there is this tendency that in reconciling, competing aspects of democracy that the Constitutional (inaudible) ... tended towards giving more and more clout in all of those models to the centre and I think particularly interesting there is the American model where effective residual powers reside with the states, and notwithstanding that, if you look over the last 20 years at the courts, there has been a movement by the American Supreme Court in the direction of allowing a greater form of congress override. 20

MS UNKNOWN:

(Inaudible) ... that in fact there is a tendency for power to

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creep towards the centre, even within strongly federal countries, isn't there a great danger if you do not have that provision for decentralisation and checks and balances, that there will be far much more too much power vested in the centre.

In other words I am saying the fact that you have a strong central government is at least a protection against too much power in the centre but even there, there is the creep towards power in the centre.

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The other point in response to what Mr Gordhan said, one is assuming that some institution, whether it is the courts or the federal government has the power or the knowledge, the wisdom to decide where services will be most efficiently rendered or where power will be most efficiently and effectively vested and the mere fact that in America for example, the Republicans have won because the people have said "you are wrong, you have not most efficiently governed the country with power in the Federal Government. We 20 have decided that we want the system changed." In other words assuming that people, I am saying that we are

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assuming that people have the ability to decide for it is a very complex issue. There will be a continuous debate from all sides of the spectrum about when power will be most effectively administered.

**CHAIRPERSON:** Yes, do you want to come back, yes?

**UNKNOWN:** I just want to clarify, I am not suggesting for one moment that this particular impetus that I am talking about depends on any form of Constitutional model. I think what it reflects 10 is a much more profound issue and it was the issue which went to someone in the debate that is going across the floor here which is how you actually classify functions and to what extend you look at the conditions of the society in which you live. It is that which you must drive with impetus.

If you hold on to saying there are countries where subsidiarity is immune, the answer is there are none and what occurs then is that the principle to hold to breaks down in the face of social and political pressures. All I am 20 now saying is don't let us run away with concepts which might be wonderful in text books but do not work in

practice.

CHAIRPERSON:

Anyone else want to comment on this? One can allow a certain latitude because I think this is quite crucial to our discussion so I think we will give time. You have spoken, can we just have somebody who has not spoken, I will come back to you. There is somebody who had their hand up on the right. Am I right? I am sorry, it is Joyce.

JOYCE:

I am happy that this issue has been raised because last week 10  
in one of our meetings I left is that where I heard one  
person from one party saying that when we look at such  
things we need not look at the need but we need to look at  
what the people want and I left confused because I did not  
know exactly what my colleague was referring to.

I think it is true, we need to choose what is best for us but  
here we have a problem because we tend to mix. We do  
not know what we need from a common position. It is  
influenced by our background which cannot be denied, like 20  
what the comrade was saying this side that we need not be  
influenced by ideologies by we need to go to the people on

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the ground and see what they need because if we look at what they want, it is a bit problematic.

I might want them to see things my way and ignore the day to day conditions. So I am just happy that this has been raised, we nearly left it as it was. Now I am more convinced that as we go through this process we faced with a mammoth task of going back to the people who are affected by the conditions of our country and it is only them that will give us the direction towards where we will be going. Thank 10 you.

**CHAIRPERSON:**

Okay, I notice, Solly do you want to come in?

**MR MANIE:**

Mr Chairmen yes, to come back to Mr Gordhan's remark. Yes I agree that the word subsidiarity maybe has a kind of ideological part of connotation, so maybe I have to throw it to him what the home economist said, George Stickler, he said "a representative government works best the closer it is to the people." 20

Secondly, people should have the right to vote for a kind

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and amount of public services they want. Isn't that the basic principles to follow?

Then we do not use the word subsidiarity.

**CHAIRPERSON:**

Okay, Solly do you want to come in?

**MR MANIE:**

Chairperson, I think this point was probably made but Professor Breytenbach mentioned something that I think we perhaps need to look at but he said that what works (and I want to quote him) "what works and what works best" 10 but I think that does not complete the question for me.

It is not just what works and what works best. You have to ask, for what? To achieve what? That is to me the question that is not being put here. You have to say, and I think one of the people on this side mentioned, what is it that we need to achieve in terms of what we have defined as our national objectives, first. Then we can say what works best to achieve that.

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It seems as if we are saying that works best but we do not know for what, so unless we have defined that and I would

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say then that it means therefore that this might work very well for this but on another issue it might be a completely different thing. The other thing that I do want to say and perhaps add, is that in the United States for example, although people are quoting all sorts of experiences from the United States, the one thing about local autonomy and subsidiarity and those kinds of concepts, it works against the poor.

It works against the poor in such a big way where they 10 remain forever poor because of the very idea that the regions and the areas and the structures are completely autonomous from one another and they are now moving towards a co-operating and sharing, experiencing and assisting one another, and I would therefore say that subsidiarity, if you really want to apply it in my view, can only be considered if things are fairly equal and not sort of the kind of imbalances that we have in our country. Things are too imbalanced.

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It means that if you allow things, decisions to be taken at the bottom where people are (inaudible) ... to do it, it will

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work very well for them but where people do not have infrastructure, they do not have resources, they do not have skills then it means you are going to tell them, do it, but they will not be able to do it, and that is clearly not what we need in South Africa now.

**CHAIRPERSON:**

Okay I notice Patricia and Peter but sir are you coming with a new point, Peter, a new point or are you responding to what Solly says?

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Okay I think, well one of the issues that seems to be emerging is the question of subsidiarity as a principle on the one hand and recognition on the other hand, that before one even looks at subsidiarity, one has to identify what the needs of a country are and subsidiarity is consequent upon that.

That seems to be a point of disjuncture in the debate so far. It is also related to the point Joyce is making, drawing the distinction between needs and wants. So that seems to be 20 a line of demarcation if you like, in the debate. You know, we cannot take this very much further because it spills over

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also into the other concepts we are looking at and I might also mention that the last section, from 3 o' clock onwards, is meant to tie, if you like, the morning session on models and the present session on concepts. So people will get an opportunity also to come in there but wouldn't those constraints, I think we will take Patricia and Peter and then see how we take the debate further. So Patricia?

**MS DE LILLE:**

(inaudible) ... express myself firstly about this subsidiarity and where the people have, the panel said that subsidiarity 10 needs to be started at local level.

**CHAIRPERSON:**

Could you speak a bit louder, I do not think, please if it is possible.

**MS DE LILLE:**

Subsidiarity has to be at local level, on top of say Provincial Legislation but doesn't it mean now like in the Federal system, that it will be exclusively powers to the locals because we differ at local levels. In one province we differ when it comes now to the needs and to the wants of the 20 people. That is my question on which I want to talk.

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CHAIRPERSON:

Just let us hear Peter and then we will ask the two panellists to try to tie things up in so far as it is possible. Peter?

MR SMITH:

Very brief, just two quick observations. First of all, with reference to what Mr (inaudible) ... was saying. The issue that we are referring to here is not just the position between efficiency, handing things down to people who are manifestly unable to fulfil the functions.

I mean we are referring to subsidiarity in the context of 10 capability of exercising them - capability. All we are saying is, if this capability, it does not mean it necessarily has to be the most effective solution but it is a capable one. People are able to fulfil the functions and it works. It does not have to be the most brilliantly efficient.

Secondly, that just the position the chair raised between wants and needs and so on, a further, I suppose, dimension of that is, which goes back really to fundamentals, is we have to ask ourselves is democracy about the quality of the 20 decisions we make or about the process of decision making.

Well you see, well that is the question. One would need to discuss that but I think perhaps those who argue that subsidiarity is a principle which should underpin our Constitution writing, or one of the principles would probably be of the view that the process of decision making is more important than the quality of the decisions. So democracy in other words is more process than substance and that would perhaps be another divide between the parties here as well. Thanks.

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CHAIRPERSON:

Okay, is it something very burning that you want to come in? Okay.

UNKNOWN:

(Inaudible) ... democracy by merely assigning it to the process question. The next question is who is taking decisions? If we are really interested about process, whether it is local politicians taking decisions, or national or provincial politicians, is one thing.

The real democratic element, and this is where (inaudible) 20 ... was beginning to take a stand, is how participatory is that decision making in terms of extra governmental forces? To

what extent are those decisions transparent? I mean Kwa-Zulu is having to go (inaudible) ... not too transparent. To what extent do people in civil society - no, no, it is a fair debate.

**CHAIRPERSON:** Just continue.

**UNKNOWN:** To what extent can civil society organisations and other interest groups actually impact on the decision making processes. The real challenge for the CA, indeed all of us, 10 is whether we are willing to create structures and processes within the Constitution which will allow for a structured relationship between governmental organs and civil society organs, and of course we have to come back to civil society and define that as well.

So if you want to really explore the process question, Chair, it is not only what happens within the governmental system and at what level, it is also what happens between the governmental system and forces outside. 20

**CHAIRPERSON:** A quick reply if you want to, Peter.

MR SMITH: (inaudible) according to the part about ourselves, I will equate, respond to that. The latter points raised are fully, we are fully in agreement of course. The Constitution must make very clear the maximum participation of civil society particularly in the participatory sense and we are fully behind that, there is no dispute but it is not really related to the principle of subsidiarity necessarily though.

CHAIRPERSON: Ah yes. Sorry, do you want to come in now?

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UNKNOWN: I just wonder what in fact the people who are making comments think of Principle 21, one has on the debate, on the whole question of subsidiarity because it says that the level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such levels shall accordingly be empowered by the Constitution to do so.

CHAIRPERSON: Okay, do you want to respond directly to that? Does 20 somebody want to respond directly to the point just made? All right. Okay, can we just deal with the Principle, what is

it - 21? Dirk wants to reply directly.

**DIRK:** (Inaudible) ... I do not know whether the background of subsidiarity has been addressed by speakers, comment from Enthusiasts and the Papal Encyclic of 1935, because you cannot understand it without that Roman Catholic and Protestant (inaudible) ... of subsidiarity.

**CHAIRPERSON:** No it has not been dealt with. You will have to be especially brief. 10

**DIRK:** That is the (inaudible) ... because the main problem which the ANC have with subsidiarity has always been that it pre-supposes that the lowest level is the best level, without efficiency, without any more to it. The ANC's position has been that the Principle, what has been quoted, of efficiency, I would like to say efficiency and affectivity, both. That is far better because subsidiarity, which is being very much misused as a political term and just a kind of slogan added, to Europe at least at the moment. Most of the people there 20 just regard it as a political slogan without reading the content, but as it is being used now, as is being for example

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very eloquently formulated by the IFP in that document over there in that footnote.

**CHAIRPERSON:** With due respect Jack, we have covered quite a lot of this.

**JACK:** (Inaudible) ... that it is, that it is, the lowest level is the best level either, without regard to it being (inaudible) ...

**CHAIRPERSON:** Dirk, with due respect we have covered quite a lot of that. I think we will have to tie up now and - Pierre, the last 10 speaker and we will have to tie up.

**PIERRE:** I am still very interested to know when we talk here about this concept and people who talk about subsidiarity and low down (inaudible) ... They say we need to do it because it is good for the people but then also Mr (inaudible) ... introduced, he says you do not actually pass power or decision making down to where people are manifestly unable to deliver those services. Now, you know, it is just interesting then, the whole issue of tribal structures for 20 instance, who are manifestly unable to deliver because they have not got the resources for one and etc. etc.

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And for instance then pulling them out of, for instance, the Durban Metro, where you can now use the collective money and the resources that resides there to deliver for people, and then to actually pull them out. It is interesting, very interesting.

**CHAIRPERSON:**

Okay. Peter, just 15 seconds, 30 seconds at most. Do you want to reply quickly?

**MR SMITH:**

Oh, oh. The key issue here is that you must of course 10 empower people, so whether one pulled out the Metro, it does not mean you are not empowering them through some other mechanism. The key challenge is to provide a Constitutional mechanism that will allow them power to, of structures, to be able to then exercise their functions.

**CHAIRPERSON:**

Friends, on that note I think we will just ask the two speakers to say something. A general observation would be presumably also that what we need to sometimes address more starkly is, at what level subsidiarity applies because it 20 is instructive that while there is talk about exercising government at the lowest possible level, I do not see I think

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any party in this country suggesting that local government should be the preponderant side of power.

I think everybody uses provincial government as the primary source of subsidiarity and that too is an issue that perhaps we can come back to. Over then to Willie and Richard to just tie up quickly as we move on to the next issue. The next context is isometry. Do you want to say anything in particular?

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**PROF BREYTENBACH:** I have got nothing to add because our purpose is to explain the concepts and I think it has been well explained through the debate that took place, so thank you very much for all your participation.

**CHAIRPERSON:** Okay. Richard does not want to speak either so we go onto the next concept in asymmetry.

**MR HUMPHRIES:** Well I, asymmetry is a term which is intimately linked up with Federal States and so it does not apply to the Unitary 20 State model at all. It would be possible I suppose to stretch its use or its applicability into Regionous States but again

simply noting that the regions in a Regionous State would only have a very weak capacity to differ with the policies designed by the central government.

My example earlier of the Natal local government legislation in the pre-1986 model will be an example I suppose of asymmetrical powers in a Regionous State so it is not really a model that holds.

**PROF BREYTENBACH:** Yes if you turn to my page on that federalist model, it is the 10  
1,2,3,4,5, the fifth line from the bottom where asymmetry is the opposite of uniform regionalism or uniform federalism, so I agree with Richard where he said that the whole debate about asymmetry or not, is actually a debate that focuses on federalism and on regionalism.

**CHAIRPERSON:** Can you just say what precisely asymmetry is.

**PROF BREYTENBACH:** Asymmetry simply means that there is a lack of uniformity  
as far as the powers of the Constituent elements in a federal 20  
dispensation is concerned. That means that canton (a) or province (a) or State (a) has more powers than canton (b)

or State (b) or province (b).

That simply is what it means, is that there can be variation in the levels of autonomy because it relates basically to the levels of autonomy and if two Constituent components, two provinces, two cantons or two States, do not want to exercise exactly the same powers, then clearly it is not a uniform system, then it is non-uniform and therefore we have then asymmetry.

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A good example would be the position of Quebec within Canada. Quebec wants to have more powers than Toronto and Ontario and British Columbia and it does have that, so Canada is asymmetrical and it would also apply to the regions of Italy, the northern parts of Italy (the richer parts) and the southern parts (the poorer parts) have in fact different levels of autonomy but it is still within the same system which is Italy and therefore Italy is also an example of an asymmetrical federation. I think that is enough said about it.

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**CHAIRPERSON:**

Okay, Peter has had a note and Ruth, Patricia, Dirk, in that

order.

**UNKNOWN:** The motivation for us, what is the motivation?

**CHAIRPERSON:** Do you want to reply Willie?

**PROF BREYTENBACH:** Different levels of capacities. Different degrees of wishing to be the master of your own destiny, so it is also a grading for self-determination. Those who want to have maximum autonomy over their own things, I guess if they can 10 negotiate it as the old Austrian system, then it is part of their historical compromise so it is quite often not the point of departure but the point where things depart, namely it is the end of the process, it is the end result of historical compromise where one finds that some entities wish to have fewer powers.

They see themselves quite comfortably within the realms of stronger central government and others would like to be more in charge of their own regional or local affairs and if 20 that can be institutionalised into a single document then we indeed have an historical compromise and that comprise by

definition is an asymmetrical one.

**CHAIRPERSON:** Yes, immediately, okay if it is a direct question flowing from what has been said.

**UNKNOWN:** Can I just ask, is it possible in such an asymmetrical situation that you actually have an evolutionary process where a province, for instance, originally it would take lesser power than the state next to it or the province next to it but as it becomes empowered and developed, that it actually 10 could take on more powers so that it eventually comes up to the same level and (inaudible) ...

**PROF BREYTENBACH:** The prime example of precisely that, is Belgium where there is a gradual shifting of powers and it is becoming more and more asymmetrical in the sense that the city of Brussels has completely different powers but it is one of the four Constituent elements in the Belgium Federation. It is the city of Brussels, the territory of the Flemish, the territory of the Walloons and the district where the Germans live and 20 neither of these four entities have exactly the same powers.

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Brussels is almost like a city state, it is interested only in those municipal type of powers that a city state would or would not want to exercise, whereas the rest of the Flemish territory and the Walloon territory, that is where the cultural communities live. Clearly they are much more concerned about own affairs. Own affairs for the Flemish language, own affairs for the Walloon language and then very similar but more autonomous, is the position of the German district in the province of Leeg.

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Different levels. So a prime example of asymmetry but where the Germans actually gain more and more cultural autonomy which is being allowed by the Constitution so the Constitution is sufficiently flexible that when the communities concerned, through their elected representatives, would want to exercise more autonomy on control of their own libraries or whatever, let them get it and in that case a Constitution allows it. It does provide for this flexibility that also allows it so there has been a gradual shift.

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**DIRK:**

A follow up.

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CHAIRPERSON: Okay. Dirk?

DIRK: A question, just for clarity. Thank you. Could I ask the speakers on account of what they said just now in the previous answer. Isn't it true then that this question of asymmetry is a question arising in so-called multi-ethnic federations, and would you agree with (inaudible) ... that this question of self-determination being brought into multi-ethnic federational concept. Those are the federations which is almost impossible to sustain and if it, and the possibility is always there that it go in secession. But that it is always asymmetry connected with the question of multi-ethnic federations with the possibility of (inaudible) ... 10

CHAIRPERSON: Yes just one second, Pierre you want to raise a question immediately?

PIERRE: (inaudible) ... more powers, in other words a gradual process. What is the criteria, is it just 50% or normal, do they require a certain majority of the people to take on more powers? 20



CHAIRPERSON: Immediately on this?

PIERRE: In that particular minute.

CHAIRPERSON: Ja, I will come back to it. Okay, Willie?

PROF BREYTENBACH: To deal with Dirk's question first, your observation is quite accurate. It is usually a problem of multi-ethnic dispensations except in one case which is clearly asymmetrical. It has got nothing to do with ethnicity and 10 that is Italy. The northern parts of Italy and the southern parts are completely asymmetrical as far as their relationship vis-a-vis the central (inaudible) ... Rome is concerned and there is no ethnic equation there because Italians are Italians and I cannot answer your question, I do not know what the answer is Pierre.

CHAIRPERSON: All right, Peter then and Ruth and Patricia de Lille.

MR SMITH: One can actually look at asymmetry, technically, another 20 level and that is, you have got one of two options and the one way is that the Constitution would list all the executive

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legislative competencies, like a shopping list, and the subordinate units would choose from the shopping list how much they wish to exercise. So you have a kind of in-built asymmetry there which our Interim Constitution provides for to some extent.

Then you get a second type of asymmetry where the Constitution would specifically isolate the province or the state and its powers are listed differently to the rest. I think in the context of South Africa without mentioning specific 10 reasons in particular.

I think the political issue is the extent to which the, it is a question of the rights of a provincial majority versus rights of a national majority in so far as their relationship, as a province, it is concerned with the rest of the country. It is a very difficult problem, one understands, but I think in Constitution writing in this country, we are going to have to take cognisance of that problem. There are rights of the national majority it is true but there are also regional 20 majorities and who is it and what mechanisms do you use to determine future relationships as expressed in the

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Constitution.

CHAIRPERSON:

Okay that is the general comment. Does anybody want to  
(inaudible) ... Okay, Ruth?

RUTH:

Mr Chairman, our key speakers have referred to South  
Africa as being federal to some extent and although the  
Interim Constitution does make allowance for provinces to  
assume less powers than what they are entitled to in terms  
of the Constitution.

10

We have had a system here where because of concurrency  
and the overrides, that the central government has not been  
prepared to give to any province any amount of powers that  
the other provinces are not willing or ready to assume and  
that has created a certain amount of the inefficiency that we  
are having and the confusion that we are having in the  
country now.

Because there is such a vast disparity between a province 20  
like Kwa-Zulu Natal which had competence to a far greater  
extent, as did Gauteng, than the Eastern Cape for example

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and yet they have all had to assume the same amount of powers, some of which are being exercised on an agency basis in the Eastern Cape through the Western Cape. Now I am just asking, would this not indicate, would this not in itself be an indication of how much better the country would be off if they were to adhere to the principle of asymmetry as it is provided for in the Interim Constitution, and even develop it further.

**CHAIRPERSON:**

Are you coming in directly on this question of asymmetry in 10  
the South African context?

**UNKNOWN:**

(Inaudible) ... instead of us indulging on various concepts and such, we need to take account of what is the key objective, for example if we discuss this concept itself without looking at the question of the nation building, the objective of building and the contract in South Africa, we will definitely find ourselves bogged down and really moving in a direction that is not going to be conducive in terms of actually meeting that kind of an objective and I would say 20  
directly to my colleagues that definitely this kind of concept, to my mind, would not be feasible for us to put in the

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Constitution because we are going to entrench this racial ethnic administration

And I think, I am saying that with not mind of I taking as such but it is important that we in the process of writing this Constitution, we ensure that we are putting into context the key objective of the nation building and I think this is what we think we should be doing.

**CHAIRPERSON:**

Okay, if anybody else wants to - do you want to reply to that 10 Willie, on asymmetry and its failure to be applied in terms of the Interim Constitution and the extent to which asymmetry might facilitate or hinder nation building. Those two are related issues, those relating them, but there are two issues there. Solly are you coming in on these two issues? Okay.

Maybe we should focus on the one initially which is the question Ruth raises, although it is related to the latter and that is that in the Interim Constitution there is 20 implementation of asymmetry. It is not being done in South Africa - on that issue specifically.

MR MANIE:

Chairperson, I mean I do not want to say that I necessarily agree with the words being stated but I think there is some substance for us to consider what was being stated by Doctor Rabinowitz but the point here is really for me, how we apply the concept of asymmetry.

If we want to apply it and say for example that because one particular province might have the ability to take on a particular function, even though the others might not necessarily have it, that they should get that function 10 because they might have the ability or capacity in that particular province, regardless of how that might impact on other provinces, then I would have a problem with that because then it looks at the narrow concerns of one particular area or one province.

There has to be a process of where, what is good for that province is looked at in relation to the needs and the overall direction and requirements of the Government as a whole. I think, for me asymmetry cannot just be kicked out as a 20 concept, it needs to be plied but in a way where it does not lead to further imbalances being created in different parts

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of the country because in the case that it has been used particularly and although the IFP is saying that they are not using this to strengthen the position of Natal.

It keeps on using that example to illustrate why it is good for the rest of the country and it does not apply in the rest of the country, and if they do have capacity there, what is good for them there, does it equally mean that if you apply that for example to the Northern Cape that it will work in the same way, with the same benefits there in that area and 10 I think it is that test for me that needs to be applied before says it is good or not good.

**CHAIRPERSON:**

Before anybody, I would like to point out it is 1 o' clock now. Can we just allocate five minutes more? There is Patricia de Lille who has to speak as well. We have got two issues before us - the application of asymmetry in the present situation - asymmetry and nation building.

Is it okay to have just five more minutes? Is it yet another 20 speaker, or shall we just round up, give it ten minutes? It was suggested actually to me actually that we should not

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have an entire hour for lunch and allocate 45 minutes anyway. So shall we go on for ten minutes? At ten past one we will stop for lunch until 2 o' clock. Is that okay? Is that agreeable? If that is the question, no I understand that, there is a meeting at ten past one, I will mention that in a moment.

May I then ask for speakers on asymmetry, its application to South Africa at the moment, and in order that their hands were put up, do you want to speak directly on this Ruth? 10

**MS RUTH:**

Thank you (inaudible) ... first of all I did not talk earlier (inaudible) ... to benefit from being able to take more powers than other provinces and if efficiency is your guard - and one is claiming that it would sort out the muddle with the provinces and you had a dual tax system, then surely those provinces would be able to do better to benefit the rest of the country in the redistribution of the second level of taxation which you want to go through the Financial and Fiscal Commission. So from every point of view I can see 20 it only beneficial.

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**CHAIRPERSON:** Right, it is Pierre, Dirk and there was another hand - on this issue? On this issue then, certainly, you precede the others.

**UNKNOWN:** I am also on this issue.

**CHAIRPERSON:** But Patricia had her hand up first.

**MS DE LILLE:** After your point raised by Professor Majola earlier on, on the debate on subsidiarity, it is so relevant to our discussion here because I think we must not just debate for the sake of 10 debating a term or terminology here. We must at all times keep at the back of our mind the constraints placed on us by the Interim Constitution.

Because he raised the point to point out to us 21 (i) actually is in contradiction with subsidiarity, and we just left it there. I think this will be the role of the technical experts in all our debates. They will sort of guide us and remind us all the times about the confine that we are in and the same with (I cannot even pronounce some of these big words) asymmetry. 20 There might also be a Constitution principle right now while we are debating asymmetry and the application thereof in

the existing Interim Constitution and the final Constitution that the technical experts must remind us about so that we sort of have a holistic debate, not debate something now and later on when we come to the term again, then we say, but look, I mean it has got no relevance at all. That is just the point I want to raise, I do not want to actually speak on the term itself.

**CHAIRPERSON:**

Ja, we could veer the discussion more and more to the extent to which the Constitutional principles constitute a 10 background against which we settle a lot of our arguments, though the workshop format was designed precisely to avoid that, to have a free flowing discussion but I think what Patricia says impinges on almost everything we do say so we will try to balance the two. On the one, we are having a free and open workshop, on the other, the Constitutional principles constituting a background. Now it is Pierre and then Patricia put her hand up and before which is, Basson is it? Venter oh.

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**PROF VENTER:**

When we look at our apartheid past, it placed various resources in different regions, all right? Let us take Sidara

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for instance. It happens to be situated in Natal. It was placed there by the Department of Agriculture - National. It serves the whole of the eastern seaboard. If central government had placed it earlier in, maybe in let us say Umtata, then it was not available as an institution for Natal.

Now I think you must remember that for Natal now for instance, we have taken control of and make policy with regard to Sidara college is plainly something that was put there and which, you know, you can say asymmetrically 10 there is no college in the Eastern Cape so therefore Natal which has (inaudible) ... that additional power simply because the institution happens to have landed there, and the same thing in the Transvaal, it happens to be concentrated in Pretoria and not in Pietersburg.

You know if it was the other way around, northwest would have loved to have had asymmetry but because it is situated in Pretoria they say maybe asymmetry is not so fine, so I think we must also... 20

**CHAIRPERSON:**

Thank you. Francois and Patricia, the last two speakers

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before we break for lunch. Francois please, before you Patricia.

**PROF VENTER:**

Thank you. Mr Chairman mine will be very brief. I actually want to latch on to what Ms de Lille had to say. A term such asymmetry can easily become a gabble with which one can bat each other over the heads with - politically, because we can debate this academically for centuries to find a unified definition of this whole term.

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Asymmetry actually is a result. Professor Breytenbach has pointed it out. It cannot be a goal. It can be a negative goal. In other words one can use asymmetry in a discussion on the new Constitution to indicate it that you do not want a Constitution which absolutely requires every provincial and local government to have exactly the same powers.

We have asymmetry right now in terms of the present Constitution because as soon as a Provincial Government legislates or adopts its own law, it actually occupies that area 20 and the neighbouring province might not do so. That is asymmetry. It is not quite "babelaas" as Professor

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Breytenbach has put it, but it is similar. I would like to point out if that is true also of subsidiarity.

Principle 21 (i) if we need to give it a name, you can call that South African subsidiarity but I would like to warn against making use of these terms and getting a different context and then using it as purely political weapons. Thank you.

CHAIRPERSON:

Okay Patricia?

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MS DE LILLE:

As I said earlier on that (inaudible) ... in subsidiarity it is still again going to divide and rule like what is the case now in Western Cape and in Natal. Sorry for those but I have to make examples. But in the Constitution, Principle number 3, it states clearly when you talk about unitary government, it should be from top down and bottom up whereby there should not be any discrimination, any form of discrimination whether it is racial or gender.

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And when you look at this asymmetry thing it is going to discriminate again at the local and rural local government,

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against the people, against the women or gender whatever we call it. So this asymmetry to me as the gentleman has said there, it is more a model of an "ethnicism" (whatever you call those big words) and self-determination whereby we talk now and we go over if we talk about self-determination, each ethnical group should have its own "Volksstaat" at the end of the day. So I want clarity then on that thing of asymmetry when it comes to Unitarianism and Federalism because there is a big difference between Unitarianism and Federalism.

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CHAIRPERSON:

Right, I think we can carry some of these issues over. I would like to warn though, we have just got an hour left to deal with a whole number of concepts. We might want to look at exclusive and concurrent powers simultaneously and then move on very fast to looking at financial and fiscal issues because they are very crucial.

So in the first instance let me just say that there is a meeting of the Core Group with the technical experts here 20 immediately we go to lunch. In fact the persons affected are asked to immediately go to the coffee room (is that right

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Mbasa?) where lunch is for all of us, is that correct, and they must return, those who are affected in this meeting, to this assembly and meet here. We meet again promptly at 2 o' clock. Thank you.

Sorry, please note that we are meeting at Good Hope at 2 o' clock. Is that right? Good Hope would be - just explain to them where it is, it is on - sorry? The IFP Chambers. Good Hope.

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**ADJOURN FOR LUNCH**

**[ END OF VOLUME II ]**

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