

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

3 APRIL 1995

2/4/3/9/20

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CHAIRPERSON: No TC3/18, Monday 3rd of April. And the Agenda - I am just too tired to welcome you, but in any case you are welcome. And then we go to the second item no 2, minutes of the Meeting - workshop held on the 27th of April. Any corrections of the minutes Monday 27th April, none.

Can we then go to point no 3 on the Agenda and that's matters arising out of the minutes of the 27th of March. Professor Du Toit, yes?

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DR DU TOIT: Point 3.

CHAIRPERSON: Yes, matters arising.

PROF DU TOIT: Ja, could I ask why this committee was not kept informed by Mr Enox Sithole of the final arrangements?

CHAIRPERSON: Just repeat that Professor Du Toit.

PROF DU TOIT: Are we on the points arising for the minutes?

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CHAIRPERSON: Yes which point?

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PROF DU TOIT: 3.1 Penguin firms, it says Mr Enox Sithole will keep the committee informed. Am I right - we were not kept informed. What is the newest position? Could Mr Sithole inform us please?

MR MXENGE: Okay, if - if I will be - I want to help. Enox Sithole did address a Core group meeting and after that meeting - at the Theme Committee meeting you know it was reported what had transpired that it the fact that now the matters is in the hands of parties rather than Theme Committees. 10

That was reported to the Theme Committee meeting last week on Monday.

CHAIRPERSON: (inaudible) ... take the point.

PROF DU TOIT: So what's the position now? Could we be informed for record purposes.

CHAIRPERSON: For nomination it was left to the parties to make 20 nominations - to participate in the TV debates. So now, I take then that parties was supposed to submit names to Mr Sithole as to who their member will be.

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PROF DU TOIT: Thank you, I assume then there is no report from Mr Sithole presently.

CHAIRPERSON: Mr Smith.

MR SMITH: Chair, I spoke to the CA Secretariat, I am not sure who it was individually, it was - was Mandla Sithole his first name.

Anyway the basic of the story appears to be that, that liaison is directly between Members going and the Penguin films themselves and the CA are not interested any longer in terms of, because we keep on missing deadlines.

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So, and I understood it was - Penguin films understood Valli Moosa was going on your behalf, but I've been told subsequently that he is not. So perhaps we should just find out.

CHAIRPERSON: Any other issues under matters arising? Doctor Rabinowitz?

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DR RABINOWITZ: Madam Chair, I can't be sure that this is linked to matters, matters arising, but it is related to the minutes. And that is

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the request that we put forward proposals by the 28th of April. With regard to the Penguin films programme.

Now we haven't had any basic document to work on and I believe that these - the directorate did have proposals previously. And that those now have being modified. Was it based on those proposals that our input are requested or did they want something completely on our own initiative?

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MR MXENGE:

If I may - if I may interfere - on the issue of Penguin films you know we, you know parties could now you know have - have control of that instead of the Theme Committee. Which suggest then that you know we as a Theme Committee you know do not have the scope you know to make suggestions as to how the whole thing is going to be run.

But only as parties can we make suggestions.

DR RABINOWITZ:

Mr Chair then - Madam Chair sorry, is there a forum through which the connection is made or is this on a completely (inaudible) ... hazard ad hoc basis?

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(inaudible) ... party contacts the Penguin films and so on. Or is there a forum whereby this is all structured? The relationship between the parties and Penguin films.

In other words is there a possibility that there might be a special media management committee? Of is this all handled by the Management committee. Or by the Core Groups.

MR MXENGE:

I don' have that information at hand, but what I suggest we do is instead of discussing the issue at a Theme committee level, let's try and liaise with the media department from party positions - from parties not through the Theme Committee.

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Let's give parties a chance to deal with the matter on their with the way - ja but not via Theme Committees.

DR RABINOWITZ:

Just sorry, Madam Chair for clarification for parties to deal with who?

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MR MXENGE:

Media.

DR RABINOWITZ:

The Media okay.

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PROF DU TOIT: Madam Chair.

CHAIRPERSON: Professor Du Toit.

PROF DU TOIT: Now I think for purposes of our minutes - it says there that the Theme Committee will be get informed. Mr Enox Sithole assistant director of media department there is no information formally available from him at this Theme Committee meeting. Could you just note that in our minutes.

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CHAIRPERSON: Thank you Professor Du Toit, but I do have a copy here which I received from my party as to the debate and maybe just to share with the members that the topics that will be covered in the debate - will be fiscal policies, taxes, safety and security, national standards, exclusive and concurrent powers.

That will be the content more or less of the debate, but I agree with you that we must make sure that the Theme Committee also receive this information.

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PROF DU TOIT: Yes, then it will be noted in the minutes.

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CHAIRPERSON:

Thank you - any other matters under matters arising, none.
Then we will go to our next point on the Agenda, point no
4 and that is the work programme.

I would just like to ask one of the Core Group members to
lead us on this item. Unfortunately I could not attend last
weeks Core Group meeting. Mr Andrew will you be able to
assist us, thank you.

MR ANDREW:

Madam Chair, we did have some preliminary discussion on
the matter and we had a discussion at our previous meeting.
But we were informed that there were items on the
Management Committee meeting agenda or the
Constitutional committee agenda - I forget which, which
indicated that the dates that we were looking at, we weren't
quite certain where - what was going to be CA dates and
which weren't.

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And therefore the Core Group, at that time felt it was a
pointless exercise to go into a work programme in detail and
then discover a couple of days later after one of those other
committee meetings that the dates and times available - we
had worked on the wrong ones.

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So it was decided to wait until the management committee and the Core - the Constitutional committee had met - which I think was today and then hopefully there would have be greater certainty as to days available and then we could attempt to do a work programme based on a factual situation as opposed to hoping that we are guessing right.

Thank you if I think that the recollection is correct perhaps Mr Smith or Dr King could confirm or correct me if my recollection is incorrect.

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MR SMITH: Correct Chair.

CHAIRPERSON: Mr Smith - did you say?

MR SMITH: I said he is correct.

CHAIRPERSON: Thank you, Dr King, just before I get to you - I just want to welcome Mr Leon Wessels and Mr Hassan - I don't know what capacity they are to watch us or to see that we are in fact meeting - but you are welcome, Dr King.

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DR KING: Madam Chair, just to add to what Mr Smith has said there.

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What we decided was only to take decisions on a short term programme and that is for the week of the 18th to the 21st - 22nd, somewhere around that.

And that we were hoping that by today or following this meeting there will be a Core Group meeting. We had hoped to put together and programme then. I am not quite sure whether they going to be able to - having the information that we have at this stage.

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But in any case that's, we have more or less put together a programme for that first week after the recess.

CHAIRPERSON: Mr Smith

MR SMITH: Chair just one thing - the whole issue appeared to be that the fact that management has negotiating with Parliament extra time for the CA. And those negotiations are (inaudible) ... to be taking place and there will be report back to us on that.

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But since the two visitors are here at this moment, perhaps they might be able to give an indication of progress on that

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score and at least guide us and we will at least know whether we are going to be in a position to be able to finalize the work programme on the basis of agreements reached between Parliament and the Directorate.

CHAIRPERSON:

Can we ask Mr Wessels or Mr Hassan to assist?

MR WESSELS:

Thank you very much. Madam Chair, I do not believe that I have any other information, other than the information that is available to Mr Smith - namely what transpired at the Management Committee last Thursday, relating to the change of programme in the sense that Fridays would be made available for CC and CA meetings in addition to the Monday meetings reserved for Theme Committee meetings on the firm understanding that there would be some - some relief for members attending to their air tickets.

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Now my understanding, which is an informal understanding and which comes with the grape vine is that the matter will be discussed further in the course of this week - at various levels, be that the Cabinet, be that works committee meetings, etcetera and I hope we could have finality on it before we adjourn for the recess.

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CHAIRPERSON: Thank you Mr Wessels. Can I then propose that we leave it to the Core Group to receive the information, outstanding information and then communicate that to the Theme Committee members, Mr Cronje?

MR CRONJE: I just wanted to know whether you are now aware that the whole first week or the first 4 days are full CA.

CHAIRPERSON: Yes, Mr Gordhan

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MR GORDHAN: Chair, I missed the early minute - meetings of this minutes - meeting. My apologies, but I think at the last Core group we did discuss what happens when we return on the 18th of April and for the next 4 days or so. I am not sure that report is already given to the Theme Committee, it has?

CHAIRPERSON: No.

MR SMITH: Sorry the (inaudible) ... hasn't Tersia did report that we got - we finalized the work programme of the first block, I mean these heading that we working on now. That section of the work programme we agreed on.

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MR GORDHAN: I think the (inaudible) ... Chair then as somebody from the

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Core Group meeting needs to report to the Theme Committee. What our plans are in that regard and I think that was one of the purposes of this meeting today.

CHAIRPERSON: Mr Gordhan I've requested them earlier on to do so, but if you have more information, can you assist? Have you got more - have you got further detail?

MR GORDHAN: Well Chair there was a document circulating, I think on Friday - I am not sure where it came from. This one here - it says work schedule - and why doesn't everybody else have it?

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MR MXENGE: Ja, that document is not meant for the eyes of the Theme Committee. It was only circulated amongst Core Group members.

MR GORDHAN: Well then we can't keep secrets from the Theme Committee. Because I think we went into extensive discussions Chairperson on what are the deadlines for what report - we also may request as I understand it to the technical experts and asked them to produce certain types of reports by certain dates.

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As I understand it Mr Andrew chaired, at that meeting if I am not mistaken. Now this schedule does seem to reflect some of those decisions. If Mr Andrew has it, he can have a look to confirm that.

CHAIRPERSON: Dr King?

DR KING: Madam Chair, what was decided was that the information which would be received - the inputs from the various parties by Friday this week, will immediately be handed to the technical committee.

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We would then request them and it is in our Core Group minutes, and I have read it already, but I may have my dates confused by 15th next week, we are asking that they actually give us the first - the first block's report which they will have revised by then.

And that we are actually asking for them to also compile the report on our submissions for block 2. That all of this information be made available for those people who do have fax machines during the recess. Otherwise that it will be available on the morning of the 18th for all members of the

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Theme Committee.

And on Tuesday the 18th, I think at 2 o'clock, we have our first Theme Committee meeting. And that the block 1 report then be discussed and then at the following day, the Wednesday afternoon, the Theme - a block 2 report will then be discussed.

So it does give people the opportunity on that Tuesday morning and Wednesday morning to actually prepare for those 2 reports to be discussed in the Theme Committee meeting of Tuesday afternoon, Wednesday afternoon and Thursday afternoon.

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CHAIRPERSON:

You know I proposed earlier on whether we should meet afterwards as the Core Group and finalize the programme. But since we got a proposed, suggested work schedule here, I don't see a problem that we present it to the Theme Committee today because we might not have another opportunity after this. Professor Venter sorry.

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PROF VENTER:

Madam Chair, could I just suggest, we had a meeting of the Technical committee this afternoon to consider what the

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instructions meant that we got by fax and we would very much like to discuss the matter of the redrafting of the first report with the Core Group or where ever.

Because we have certain ideas regarding that. Regarding the usefulness of that and exactly what might be needed. What I am suggesting is, that if you - if you could consider not to make a hard and fast decision right now, before we had some opportunity to discuss it with you.

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DR KING: I ...

CHAIRPERSON: Dr King.

DR KING: I would accept that we do that we refer it then to the Core Group that meets directly after this meeting tonight.

PROF DU TOIT: I also support that yes.

CHAIRPERSON: What I was referring to earlier on is - if I understand you correctly, is that we are talking about the work programme after recess. From the 18th onwards.

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If we can finalize that and then Prof Venter has now requested a separate meeting with the Core Group on the report and since there are some copies available of a suggested programme. I - I was going to suggest that we deal with it now and I wanted to hear the view of the committee on that.

MEMBERS CONVERSING SIMULTANEOUSLY

CHAIRPERSON: Mr Smith? 10

MR SMITH: Sorry perhaps I misunderstood you. I understood from Mr Wessels, as only - as we go into recess that we will have finality on the dates available for us to be meeting after recess.

That is what I understood at least, in terms of adjustments of the programme.

CHAIRPERSON: No. 20

PROF DU TOIT: No-no.

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MR SMITH: Oh!

PROF DU TOIT: What is not - what is not in dispute is that the first week, starting on Tuesday the 18th, will be reserved for CA work. That whole week and Parliament will only resume its work on Monday the 24th of April.

MR SMITH: Chair, I am quite clear on that I thought we are talking about - now (inaudible) ... on that we can't work out until we have finality on the dates.

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So that I presume can only be done as an exercise once we return from recess.

CHAIRPERSON: Okay, Mr Cronje.

MR CRONJE: Ja, on that one, I am sitting on the small committee that must work the rules of Parliament and we had the instruction that deal has been made that for the whole of that next quarter. That Mondays and Fridays will be available for CA.

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There is only one slight problem and that is I think the 28th

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which is a Friday, where the Thursday is a public holiday. Which we think that we most likely will not get many people here then.

The only other problem is that we have very little time for legislation and we said then, that maybe by negotiation, some point or another, if it is necessary, we can make some deals of you know particular natures. But enlarge, that is the idea. All Mondays, all Fridays is available.

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DR KING: Madam.

CHAIRPERSON: Dr King?

DR KING: Madam Chairperson, may I just say at this stage perhaps - and that's really just my own opinion, from the problems that we - we have run into whilst we have Mr Ebrahim and Mr Wessels here.

And this is a practical problem. Is that when they make concessions like giving us the week of the 18th to the 22nd or whatever. There is so little time before that we can really organize a programme for that, that it - it's not really going

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to serve the purpose which it would have served very well if we had known two weeks earlier.

Because we are going into recess at the end of this week. And we come back on the 18th. And then immediately we have three days of with three afternoons where the Theme Committee has to keep themselves busy and it is not possibly to really organize a sensible programme in that way. If it was two weeks later, but it is very difficult now, especially with the Eastern weekend in between, to even find someone to do a workshop.

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And that's the kind of practical problems that we have when we arrange the programme for the Theme Committee. And I am just asking that perhaps they will just take note of that.

CHAIRPERSON:

Mr Wessels?

MR WESSELS:

Thank you very much. Madam Chair, I am sorry - I hope our presence does not cause you any difficulty. But apparently it does cause us some inconvenience, but we are delighted to be here.

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We just wanted to say hallo and just experience the warmth

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of the Theme Committee, that's why we are attending not to say anything or to do anything.

Madam Chair, my I just say on this score that we convey the confirmation that we get, whenever we get it as soon as possible and on the request Dr King has now just made, we did not have prior certainty on that matter, because we only received it from other quarters.

And in that respect we take note of what she is saying and we will certainly do from our side, to manage to the best of our ability. But as you now have discovered, I also learnt from Mr Cronje with some authority, that we - what I thought was going to happen has now happened and I am delighted to hear that. Thank you.

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CHAIRPERSON:

Well we will proceed with the suggested programme. Unfortunately it's too late now to make copies for the members. We only have got one copy here, Mbasu will lead us through the one four days and if members can just take notes of what the suggested programme is all about.

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MR MXENGE:

On the 18th, which shall be a Tuesday, the Core Group will

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meet in the morning and we will collect the information if they haven't you know that is the report from our technical advisors. And then in the afternoon we shall have a preliminary discussion of the report and submissions from parties. In the afternoon between 2 and 5.

CHAIRPERSON: Core Group?

MR MXENGE: No the Theme Committee and then we following day, which shall be Wednesday the 19th April, the Theme committee will meet in the same venue between 2 and 6. To discuss a report on block 1. That is the report which has been sent to our advisors for drafting -or redrafting.

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And there shall - the Theme committee shall also discuss submissions and a report on heading 2 phase 1. That is - now the you know the report which has been discussed by the Core Group shall be tabled before the Theme Committee for it's approval.

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On Thursday the Theme Committee shall meet or shall have a session with the technical advisors you know because we expect that on Wednesday we would have gone through the

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document, that is the report and if there are any problems then those are going to be thrashed out on Thursday at a session with our Technical advisors.

On Friday we shall have a workshop on Heading 2 phase 2. That is the workshop on Inter Governmental Institutions. Things like the Senate etcetera and the Core group will also finalize the second report on - on the financial report that was - that was discussed at - that was thrashed out on Thursday with the Technical advisors.

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There shall also be a need to look at you know the framework and agenda items on local Government. So it looks like Friday is going to be a long day. But the Theme Committee meet in the morning at half past 8 to half past 12 and then we will try and organize some Core Group meeting later on, to look at the framework and the agenda items for - on local Government.

PROF DU TOIT:

Are we going to get this in writing, this time?.

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MR MXENGE:

No this - this is the suggestions framework and it was - we did not anticipate that this was going to be - no-no this is

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not the document. We did not anticipate that this was going to be raised at the Theme committee meeting, because we thought it had to be approved by the Core Group first before I tell you before the Theme Committee.

It's - the gun has been jumped a little - you know a bit.

DR KING:

Madam Chair, may I just say that - that some of that programme I am not aware of that's new. And can we perhaps at the Core Group meeting just make the final decisions on that evening and can we ask that it actually be handed to all members tomorrow in writing then?

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At least just that one week programme. So that we exactly know what times people need to know when to be available.

CHAIRPERSON:

Dr Rabinowitz and then Mr Cronje

DR RABINOWITZ:

board another

Madam Chair, please I just want to make a request. That when the Core group meets tonight as well, they take on proposal that was made and I don't know to what extent Mr Smith has really discussed it about our request for yet another workshop.

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Which will look at the issues of the distribution of powers as it works in this country first and as it relates to the ANC's proposed model and as it relates to the IFP's proposed model. Not in theory as we have been doing to date. But in terms of somebody who could help us to understand how it all works in practice.

Just differentiating between the legislature and the - or legislative powers and the executive powers in particular and those proposals were submitted but I don't know to what extent they have been discussed by the Core Group.

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One would just request that before you finalize reports, we have such a discussion so that we have complete clarity on these issues.

CHAIRPERSON: Mr Cronje first

MR CRONJE: Ja, unlike Dr Rabinowitz, I want to talk about the programme before us and suggest that we adopt it with minor modifications which Mrs King want to make.

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CHAIRPERSON: Comrade (inaudible) ...

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UNKNOWN:

Chair, I am not sure - I am not sure where we are. I thought we were going to discuss this programme and see if we agree and if there is any need to make amendments, then we do so.

But if the Theme committee has a problem, because from what I hear Ms King seems to be having a problem. We probably will have to take a decision then to postpone discussion of this matter and take it to the Core Group, because I think we really are wasting time. And we just adjourn and let the Core Group come together, discuss this programme and see which other day we can meet, before we adjourn this session to present the programme to the Theme Committee.

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CHAIRPERSON:

I suggested that right in the beginning, but through the debate it was then agreed that let's look at the suggested programme. But if members again feel now that this suggested programme must go to Core Group, we can do so.

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And then find a way of reporting back to the Theme committees, because we are not going to have another Theme committee meeting again. That was my concern, to

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rectify the recommendations by the Core Group.

MR CRONJE:

Chair, on a point of order, I made a proposal that to adopt the programme with only minor modifications which Ms King might want to bring to it and you just distribute it. We don't have to meet again to discuss it. Because the whole committee can't draw up a programmes.

CHAIRPERSON:

Any support for that proposal?

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DR KING:

We made that proposal some time ago already.

CHAIRPERSON:

I just want to go through meeting procedures - they mustn't accuse me afterwards of bambooseling the meeting.

So it has been accepted, any counter, no. Thank you. What is the next (inaudible) ...

MR SMITH:

Chair, I wonder if I could just - perhaps I missed something. But I wonder, if I could ask through you, ask Dr King whether her problems were fairly substantive one's or are they minor?

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I mean (inaudible) ... that she believes strongly we need of (inaudible) ... and resolve in a Core group. Or I mean is how you feel strongly about? We need to sort it out in a Core Group or could we accept it?

CHAIRPERSON: Mr Smith, Dr King is part of the Core Group so she can raise it there.

MR SMITH: Sorry the proposal though has been put before us.

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CHAIRPERSON: Yes.

MR SMITH: Is not to take to the Core Group.

CHAIRPERSON: It's total of (inaudible) ... really. Dr Rabinowitz.

DR RABINOWITZ: Sorry madam Chair, but this seems to put aside the proposal that I made without discussing it at all. That it is something I feel very strongly - that we meet before we finalize our submission on the division and powers between various levels.

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Legislative, executive, three different levels. I feel we need

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greater clarity on this. Not as a theoretical issue but in practice. That's what my request was. The submissions have been sent to the Secretariat. Thank you, or the proposals.

CHAIRPERSON: Thank you Dr Rabinowitz - we'll move to the next item now.

DR KING: 'Vir jou a dummy bring om aan te suig'.

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UNKNOWN: I am told she'll bring a dummy now.

CHAIRPERSON: Order - can we move to the next item? It's general. Anything you want to raise under general?

MS HAYDON: Just draw their attention to these two documents (inaudible) ...

CHAIRPERSON: I just want to draw your attention to two documents. The one is the revised version by Professor Majola. And then also the revised version by Professor Davis. You have collected them from the front there.

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MR MXENGE: Can I draw - oh! ja.

DR KING: Madam Chair, I understood that this meeting would also be used to give a further opportunity to discuss the constitutional principals.

CHAIRPERSON: We are coming to that.

MR MXENGE: Can I also add onto the list of items under general, a suggested framework for Heading 2 phase 2. There is a one pager which was circulated amongst members. Which - which is a skeletal framework, which we shall ask one of our advisors to take us through.

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CHAIRPERSON: And that's all.

MR MXENGE: And now but Constitutional (inaudible) ...

PROF DU TOIT: Madam Chair.

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CHAIRPERSON: Professor Du Toit.

PROF DU TOIT: Ja, before your advisor, I don't know what advisor has

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drafted this - take us through this, this is - this is only for notification. We are not going to discuss it now, I believe.

We just take notice and I take it that phrase 2 is block 2. Is that right?

MR SMITH: Sorry, Chair, is this being here - is this for noting or for discussion? Because if is for discussion?

PROF DU TOIT: Yes, (inaudible) ...

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MR SMITH: No-no it's just to make one point, it says here the heading is inter Governmental Institutions, I thought the heading was inter Governmental Relations. And I am not sure if it actually ends up in a difference or not. But perhaps we can get clarity on that.

CHAIRPERSON: Just explain Mbasa.

PROF VENTER: Madam Chair.

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CHAIRPERSON: Professor Venter?

PROF VENTER: Can I just explain, we received a fax of the Core Group

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meeting, I think it was the Thursday, which stated amongst other things that what was required - were agenda items for block 2 phase 2 a framework for submissions.

And we had some difficulty in understanding exactly what was intended, because we - as somebody else just now mentioned, weren't certain whether it was heading 2 and phase 2 or block and so on.

But we met this afternoon and Mr Mxenge clarified it to us that it refers to the one question that was shifted from the block of questions that we drafted previously dealing with the co-ordination - inter Governmental co-ordination that might be possible.

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Then we sat down this afternoon and we discussed the matter. Mr Mxenge made notes and those are the notes that you have before you. We thought that if that is required now, Professor Bongani is ready to clarify what was intended there.

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PROF DU TOIT:

Madam Chair, ja I think that is order for the clarification and because this is useful to note I think but the

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clarification will help. Thank you.

CHAIRPERSON: Professor Majola.

PROF MAJOLA Madam Chair, thank you very much. The item as Professor Venter has said, relates to block 2 phase 2 and it's inter Governmental relationship as Mr Smith had said.

A question was posed in the framework that Professor Venter submitted in this question 7. Which read:

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Should the constitution provide for additional inter Governmental mechanisms to enhance co-ordination and to prevent or mediate possible conflicts regarding the exercise of competencies.

Now first of all if you look at the Constitutional principle, no 23. It is clear that the aim was actually to try and deal with problems of co-ordination and conflicts especially.

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And the question then assumes that in addition to what Constitutional principle 23 provides, whether it is necessary to get or to include additional mechanisms to deal with inter

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governmental relationships.

Now, I think in this case, one should first of all find out whether these mechanisms should be provided for in the Constitution. It is possible - they can be provided for in the Constitution. I will come to - at a later stage to give examples of such mechanisms.

They can also be provided for in Parliamentary legislation and when they are provided for, either in the Constitution or Parliamentary legislation, they can be made to be made voluntary mechanisms. In other words, the parties involved can have an option to adopt those mechanisms or they may be made compulsory. So that when - when there are disputes or there are problems of co-ordination, those mechanisms can be involved.

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They can also be just not provided for in the Constitution or in Parliament legislation, but they can involve, they can be evolutionary. The examples of such mechanisms which we could think of in the afternoon, where first of all of an executive nature, or at an executive level.

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We are thinking here of the possibility no 1 of having inter provincial forum - that would involve the Premiers conferences for instance. Also no 2 - you could have the MBC conferences - that is also at inter Governmentally and inter Provincial level.

And then you could have at a slightly horizontal angle, you could have conferences between the MEC and the National Minister. If you look at section 2.20 of the present Constitution, section 2.21. It provides for such mechanism as far as the South African Police services is concerned.

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You would understand that there would be all kinds of problems of jurisdictions, of responsibilities and so on and I think that such a mechanism therefore facilitates co-ordination and the solution of problems.

At the legislative level, you could have inter Governmental legislative committees that would meet occasionally to discuss legislative proposals that come out of Provinces and they would share ideas and so on.

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We observed, however, here that there might be a need or there might be no need for such a mechanism depending on

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how strong your separation of powers is. In other words, how strong do you separate the legislative from the executive and from the judiciary in a particular constitution. If the separation is a weak one, then you wouldn't really need this mechanism because I think it can be taken care of at the executive level, that I have discussed.

The third level is the administrative level - here you could have structures like the Director Generals - Directors General conferences - I am thinking of the financial and fiscal commission which is established in terms of section 198 to clause 6 of the Constitution.

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Again, as far as the police are concerned, you find that section 2.22 provides for the establishment of a board of Provincial commissioners who deal with the co-ordination of Police services - inter provincially and they sought problems that arise there.

And then fourthly - the fourth level is the level of the Senate - the Senate can be used also as a mechanism to sort out inter Governmental relationships - depending on how you structure your Senate. The question therefore that one

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would raise here - is how should the Senate be composed or structured it in such a way that it can play this role.

The role of such structures would be largely - I think, mediation, mediating dispute. Secondly it would be co-ordination of powers and activities. Especially inter provincially and between provinces and the National Government.

Three they would look at the needs assessment. Which is very important for the next role. The role of planning, because if you have these structures, you could do joint planning of national policy.

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I am thinking of the house level for instance, where you find that the powers or that national level and at provincial level. Now the same goes with Policing.

The question that I think needs also to be asked - is what should be the nature of the powers or decisions of this forum. Or should they be having advisory powers or should they have, should they take binding decisions and so on. I think that I should stop there.

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CHAIRPERSON: Thank you Professor Majola. I don't think we need to debate this today, but if there are any questions of clarity - I will allow members to ask that. Mr Smith and then Professor Du Toit

MR SMITH: Just questions, clarities thank you Chair. The Senate - the issue on the Senate. Now we haven't decided - we have decided already on our work programme to do a whole submission on the Senate. So I am wondering, do we bring that for or do we just take out relevant parts of the Senate which (inaudible) ... to this.

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And the last item in this framework, item 4 which is Constitutional 23, I am reading Constitutional 23 and I am not quite sure I understand the reference to - you know on the framework, how it relates to the actual Constitutional principle. Perhaps I have just missed something.

CHAIRPERSON: Professor Majola.

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PROF MAJOLA: The - thank you Chairperson. The whole question of the Senate, I think it got in as an example of you know some of the mechanisms that can be used. It is not intended to open

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debate on the Senate as a whole.

In other words, it just gives a manual. When we talk about inter Governmental the relation of inter Governmental relationships what we can use. I hope that answers the questions.

Secondly if you look at principle no 23, I think it anticipates amongst other things that there may be a dispute or some conflict between the - in the exercise of concurrent powers that are given to both the Province and the National Government.

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And it kind of provides a mechanism for sorting out that conflict relationship between those two, but I think question 7 is wider than the ambit of Constitutional principle, clause 23.

CHAIRPERSON:

Thank you Professor Du Toit?

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PROF DU TOIT:

And thank you madam Chair. I suggest that we take note of this - this what do we call it the submission or something. And file it with our papers.

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I must say, that as a framework, the lack of (inaudible) ... of the occurrence of inter Governmental relations, makes it not very useful as a framework to write a submission on.

But I think it is very useful as a list or agenda of the type of items or examples which should be brought under inter Governmental institutions. I suggest that we step off the matter now.

CHAIRPERSON:

Doctor Koornhof?

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DR KOORNHOF:

Just a matter of clarity. Are we correct to Professor Majola - are we correct to regard the FFC and the Senate and maybe even the CPG as an inter Governmental body. And if we say yes, shouldn't we include the CPG here as well?

PROF MAJOLA:

I am sorry I ...

DR KOORNHOF:

I am asking whether we are technically correct to regard the Senate and the FFC as inter Governmental bodies. And if we say yes, we should include them, regard them as inter Governmental bodies. What about the CPG?

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PROF VENTER:

Madam Chair, the CPG has been devised for the present constitution, for the purposes of assisting the phasing in and of the new provincial system of Government. As well as to assist the Constitution Assembly for the drafting - in the drafting of the new Constitutional text.

The CPG was not designed necessarily to be continued in the new Constitutional text. But, that would be one of the options that could be considered to have something similar as an inter Governmental mechanism to ensure that there are fora where matters could be discussed.

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The financial and fiscal commission is something which is required by the Constitutional principles to be continued and established as a matter of fact, as a very important, a fundamentally important mechanism, to - as to make sure that in the financial and fiscal area, there would be provincial input in the budgets and as well as in the allocation of funds to the Provinces.

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CHAIRPERSON:

Thank you Professor Venter, Mr Geldenhuys.

MR GELDENHUYS:

Madam Chair, Doctor Du Toit proposed that we actually

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step off the matter. Will we have another opportunity of debating it because the provision of these mechanisms - as far as we are concerned is of the essence.

CHAIRPERSON: Yes, we will debate it at a later stage Mr Geldenhuys. We just put it here for noting today, because members only received it today. But we will discuss it at a later stage. Professor Majola?

PROF MAJOLA: Yes, we apologize to the Theme Committee - that it has come in this late. But we promise that we will improve on this document and include the problematisation that ...

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CHAIRPERSON: Can I just hear Mr Gordhan at the back.

MR GORDHAN: Chair, I am just wondering in anticipation of that discussion should we not ask the technical experts to actually prepare a presentation.

CHAIRPERSON: Yes.

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MR GORDHAN: Along these lines and then take on board the kinds of observations that have been made. So that we don't just

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accept it as a framework but accept the idea that some presentation will be prepared. And we ready to hear it and read it, we can bring it on board. At least they have some time to do that work.

CHAIRPERSON: Yes, Professor Du Toit?

PROF DU TOIT: I just wanted to observe that the literature on the subject is immense. And I do believe that the Department of Constitutional Affairs also already prepared documentation on this during last year. And perhaps that documentation can be made available early to the members of this Theme Committee, at least to understudy it beforehand and if a submission is being made, by our technical experts, that literature or some kind of memorandum be made available beforehand.

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CHAIRPERSON: Thank you Professor, so we will request that technical committee then to prepare a fuller presentation for us - circulate it before the times that members can have time to peruse it. And then we will arrange to put it back on the agenda, Dr King?

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DR KING:

Madam Chair, I just want to mention that I am not quite sure whether it is 1 or 2, but I think it is block 2 - Theme Committee 2. Actually does work on the Senate as well. And that we shouldn't do everything or repeat everything - perhaps we should just try and get some information from them as well.

CHAIRPERSON:

Thank you - just one item that was not on the agenda, but under general - the Core Group had a request last week that we continue the debate on the Constitutional principles.

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Some of the members wanted to raise further issues. But we ran out of time last week. So we will now continue with the debate on the Constitutional principles. Mr Smith?

MR SMITH:

Chair, I think - I think perhaps one of the issues we'd all be interested in is principle 18.2 - particularly, if you don't mind personalizing it slightly.

In the light of certain proposals being made on the opposite side, and I wondered if the experts had an opinion or perhaps the ANC members themselves perhaps can express an opinion on the reversal, the re-phrasing of section 126.

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To give national Government legislation predominance -
preeminence over provincial.

And I'd be interested in hearing what people have to say on
that issue as one issue to table for discussion.

CHAIRPERSON: . . . So you are putting the question to the ANC? (inaudible) ...
Mr Smith, do you want an answer from the technical
committee or from the ANC?

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MR SMITH: Well Chair, I mean it flows from Professor Venter's paper -
the whole issue of section 126 and read in conjunction with
principle 18.2.

So, I think we have an interesting real life scenario before
us and I just inviting comment. I mean it's just - I think it's
a good example to discuss in the light of Constitutional
principles. The kinds of problems we are going to have
when we start putting proposals forward and - because the
whole issue of these principles is a test of Constitutionality.

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And I am simply inviting Collin from the experts on an
example as before us.

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PROF VENTER: Madam Chair.

CHAIRPERSON: Professor Venter.

PROF VENTER: I think the safest thing for me at this stage to say is to refer you to page 5 of that submission where I think the core of the whole matter - well I attempted to put concisely the core of the whole matter.

It's in the last paragraph - where I submitted that in the context, the word substantial means that the provincial competencies of the new Constitution need not be exactly the same as those of the present Constitution.

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But that the Provinces should be left in at least the same position of relative competence regarding the national Government as they can be now.

What followed was the statement that this is very difficult to assess in the abstract. And I think it is still has to be assessed in the abstract. It is - it will eventually be for the Constitutional court to consider the precise terms of the new Constitutional text - to determine whether - whether the

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Provinces are at least in the same position of relative competence.

And I really think at this stage, it is a matter of political debate, to determine whether the position will be still in - relatively the same as it is at the moment if you diminish the - either the legislative or the executive powers of the Provinces. I think it would not be healthy for me at this stage to comment directly on what the ANC proposes, because I don't exactly know in precise terms.

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MR SMITH:

Chair if only to follow up with being precise. Because it is perhaps unfair, but when we talk about the Provinces not being in relatively worse position. Can that be taken to mean a province individually as oppose to an agglomeration of Provinces exercising common powers.

PROF VENTER:

For that madam Chair, one should look I think the precise words of principle 18.2 - which says:

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The powers and functions of the Provinces define in the constitution. Including some other things should not be substantially less than or substantially inferior to it.

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It is, I would read it, I don't know if my colleagues would agree, but that refers to the Provinces as a level of Government, as a Constitutional institution. It is not aimed at safe guarding a specific Province and I don't - I would be careful in concluding from the wording there - that it would mean that the Provinces could for example on a voluntarily basis, agree to a reduction or an increase of their powers and incompetencies.

CHAIRPERSON:

Professor Dy Toit.

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PROF DU TOIT:

Ja, thank you Chair. No it - I want to ask this question in this regard from our Constitutional experts.

The fact that we have in schedule 4 principles and not clauses of law, does that make a difference in the way you suspect the Constitutional court will interpret it. In a sense that principles are guides, (inaudible) ... would that make an effect. Or would it have any effect - would you - would you - do suspect it will be interpreted in the light of political realities or would it have receive a normal street interpretation as we normally interpret our laws generally.

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PROF VENTER:

Madam Chair, that question I did try to address in the first part of my presentation last week, where I tried to indicate that it would be inevitable for the Constitutional court - to read the Constitutional principles as principles underlying the new Constitutional text as a foundation.

And that they will have to be read in conjunction with each other as a whole with an internal consistency - that I think, would be the approach that a normal court of law would follow.

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Obviously that means that the principles are not and cannot be considered to be provisions of a Constitution. Substantive provisions and the wording of the principles need not be reflected exactly in the Constitution.

But the Constitutional court will have to give effect to the meaning as it in the primarily emerges from the words that were used, are used, in the Constitutional principles. And it's on that basis that I am saying that for example principle 18.2 can hardly be read differently than focusing on the provincial system as a whole.

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Political reality and reality in general will naturally also influence the Constitution court, the Constitutional court won't be able to deal with these matters as an academic abstract thing that can apply in any specific country.

But one must also be careful not to consider political realities to include the trend that might be divined from the elections and so on as to the political preferences as such.

But political reality in the sense of half, how the provincial system has evolved, how the whole system was devised in the present Constitution. How it's been established and how its been evolving at this stage, certainly I think those things will have to be taken into consideration.

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CHAIRPERSON:

Dr Rabinowitz and then Mr Gordhan and then Mr Geldenhuys

DR RABINOWITZ:

Madam Chair, to the experts and Professor Du Toit perhaps, there was quite a lot of discussion last time about this overwhelming majority giving rise to a change in interpretation of the Constitutional principles.

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Not even changing interpretations but almost like a rejection of the Constitutional principles on the grounds that an overwhelming majority might support such a change.

But now you know overwhelming majority meaning what? We can't continue to slip around this. One assumes or one can read overwhelming majority. One has to decide - is this by referendum. Is this by the majority of the Constitutional Assembly. Is this by majority of Provinces.

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Because for example, say the Western Cape and KwaZulu Natal don't accept what the other Provinces do accept - or what is known as the overwhelming majority do accept. How does one decide whether their views should be taken on board or not I am just looking for a degree of clarity in your interpretation of overwhelming majority.

PROF VENTER:

Madam Chair, I think the answer to that is quite brief. And that is that the Constitutional court is a court of law which will be required, which is required by the Constitution to interpret the Constitutional principles as legal guide lines for the drafting of the new Constitution.

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The Constitutional court is not called upon to interpret the outcome of any election.

CHAIRPERSON: Mr Gordhan.

MR GORDHAN: Chair, again, in - with reference to 18.2 and perhaps thinking of Mr Smith's point in a very indirect way - what are substantially less and substantially inferior refer to? Does it refer to the number of functional areas in powers - does it refer to the kind functional areas and powers? Does it refer to the collective functional areas, in other words, collectively do they "weight" the same or not?

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How do you, what kind of - I think Professor Davis last week used also the concept of elasticity. What elasticity is there in that interpretation?

PROF VENTER: Again Madam Chair, I can do no better than to refer what I also said last time and repeat just now. Substantially - not substantially less refers to - on the face of the meaning of those words - to quantity.

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It is not supposed to be quantitatively substantially less and

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substantially inferior refers to quality. In other words, the substantial quality of the competencies of the Provinces should not be reduced. Now, having said that, it does not mean that the powers and functions of competencies of the Provinces must be exactly the same as they are in the present Constitution.

But looking at the whole as it emerges from a new Constitutional text, it will have to be considered by the Constitutional court, well in first place by the Constitutional Assembly and then by the Constitutional court. Whether - whether the qualitative and quantitative picture that emerges, regarding the position of the Provinces, is substantially less or relatively - or relative to the national Governments powers and functions.

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In a general area, similar to what they are right now. More precise - to be more precise, than that at this stage, I really don't think it's possible - until one has a concrete text to consider.

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At this stage it's only possible I think to consider the extremes. Taking away all competencies regarding

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education from the Provinces would be an obvious reduction, substantial reduction to take an extreme example.

Where as it would be an unwarranted extension or an extension not required by the constitutional principles if the Provinces were given powers to deal with everything dealing with police and taking it away from the national level. As examples of the extremes. But to be more precise like that, I don't think it's possible right now.

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MR GORDHAN: Can I follow that up chair?

CHAIRPERSON: Mr Gordhan follow up, after him I've got Mr Geldenhuys, let me just check it. Mr Yunnis Carrim and Senator Bhabha.

MR GORDHAN: Chair, the question is, following what Doctor Venter just - Professor said, if we take away all the powers, as an IFP majority Government at a national level, some of the particular Province in respect of education. But replace it with provincial powers on defence for example. Does that change the picture in any way?

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The second question is, does provincial powers in respect of

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executive or legislative issues, have to reside necessarily within the provincial domain. What if that configuration is changed? And Provinces are given some power at a national level. What happens then?

CHAIRPERSON: Professor Venter?

PROF VENTER: I am not sure if I understood the first question correctly, but if I can interpret it. I don't think it's merely a question of exchanging different functional areas and swopping them around. Because it could be argued for example, if all competencies regarding education is taken away, never mind with what it is been replaced.

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That would go contrary to the Constitutional principle. That could be considered to be a substantial diminution of something which the provinces are involved in right now, very fundamentally.

Regarding the interchange or exchange of legislative and executive powers and functions. I think this is an area of risk if it is to be argued that the one is to be increased substantially and the other one diminished substantially.

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That would depend very much, I think, exactly how it is done. But in principle, I consider it to be an area of Constitutional risk.

What I intend to say by that is, that it is not obvious that would be in order in terms of the Constitutional principles. As a matter of fact, I think there might be very strong arguments to say that the Constitutional principles require local Government and provincial Government to have both legislative and executive powers.

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I am not sure if I understood the questions correctly.

CHAIRPERSON:

I think you did. Could I just warn you Professor Venter, I am going to request that this part be transcribed, because I really believe it is an invaluable discussion going on here and intervention Professor.

PROF MAJOLA:

Yes on the question of what would be the position for instance if education powers are taken away and replaced with defence powers.

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I think that would amount to a substantial reduction and I

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am saying this solely because powers are given to levels of Government for particular purposes. And I think that already now, the powers of education have been given to Provinces because there is a particular need that they have to satisfy there.

And if you are going to take them away and give defence powers to Provinces who really do not need to use those powers, I think you would, I think you would be substantial reducing the powers of what (inaudible) ...

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CHAIRPERSON:

Thank you, now I have Dr Geldenhuys.

DR GELDENHUYS:

Chairman, I just want to react on a remark made by you when you were not in the Chair. You pointed out that perhaps principles and norms are more or less on the same level.

Now I just want to point out, in my view, I think a principle is much stronger than a norm - is the fixed point of departure from which you cannot deviate what their legal status are going to be - that I cannot comment on. But I just want to point out, I think a principle is stronger than a norm.

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CHAIRPERSON:

I shouldn't comment now from here on this bear with me comrades. 'As 'n ou Calvinis is die beginsel vir my van dieselfde aard. Dankie, ek verstaan presies wat u sê'.

Now I have Mr Yunnis Carrim.

MR CARRIM:

Comrade Chair I am covered in the sense, I was going to pose the same question as (inaudible) ... Gordhan was, in a different way slightly. About the weight one attaches to legislative versus executive powers. And how that balances against principle 18.2.

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But the other question I wanted to pose was, let's assume that a Province decides on a provincial Constitution. It shaped a provincial Constitution by November this year and I understand presumably that provincial Constitution has to meet with a two thirds majority in the legislative of the Province.

And then it submits that the Constitution, to the Constitution court which then certifies the Constitution as acceptable - if it meets with the Constitutional principles in 34 that are in the Interim Constitution.

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But what happens, if in the meanwhile, the CA agrees by a two thirds majority on a very different weighting, or a different form of the weighting of powers between Province and central State. What would happen to that provincial Constitution?

It would meet the Interim Constitution requirements - but it may not meet the requirements of the new Constitution which might have a different configuration of provincial and central powers. How valid would such a provincial Constitution be? Am I being clear enough?

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CHAIRPERSON:

You are clear and that's a crucial question, Professor Venter?

PROF VENTER:

Thank you can I also, just before I reply to the question of the provincial Constitution, refer to the first part of the question. I might have pointed out in replying to Mr Gordhan's question, that principle 20, very specifically says that each level of Government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively.

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That is an indication that both elements of the normal Governmental powers competencies need to be provided for. If a Province, provincial legislature were to adopt a Constitution now, it must conform to the Constitutional principles. It's got to be certified as conforming to the Constitutional principles and it must not be, may not be contrary - run contrary to the present Constitution except insofar as it provides for - except insofar as it provides for legislative and executive structures and procedures that it can do.

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I do think there is a limitation on that also in that the general tenor of the Constitutional principles will also have to be satisfied - those of accountability of affordability, of affectiveness and so on.

Now, the new Constitutional text being drafted by the Constitutional Assembly must also conform to the Constitutional principles. And much of the Constitutional principles will have to be concretized in the new Constitutional text.

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That really causes or let me put it this way, it really limits

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the possibilities of a conflict between a provincial Constitution adopted before the new Constitutional text is adopted. Because they have both to conform to the same basic set of principles.

But should there be some element in the new Constitutional text - which conforms to the Constitutional principles, which clashes with a Constitution of a Provinces - adopted in the mean time. Then the provincial Constitution will have to be changed, because provincial Constitutions will in perpetuity have to be - have to conform with the national Constitution. That is, one can almost call it the natural way of things in composite states. Such as the one we have.

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CHAIRPERSON:

Now, could we close this on Senator Bhabha's question. I am afraid time is running along. I also have to locate the seat now for Ms De Lille. Shall we just - okay reveal could I just arrange there won't - no for further discussion is wanted.

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I'll just sit then for Senator Bhabha's one and let me just see the hands again? Peter Smith and Mr Modisenyane - ag no Seraki Leeuw. Just a moment and just - Senator

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Bhabha you can put your question in the meantime.

MR BHABHA:

Does the sorry the creation of further cheques and balances - does the creation of further cheques and balances on the provincial legislature - does it necessarily, can it necessarily be interpreted as lessening the powers and functions of second chair Government?

PROF VENTER:

Mr Chairman, or Madam Chair - Madam Chair I think the answer is no. A further separation of the legislative and executive functions I think is actually required by the Constitutional principles - specifically principle 6.

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That does not reflect on the quality or the quantity of the functions of the competencies of any level of Government - it deals with the structures. Cheques and balances - do not reduce the total of competencies. It builds in a mechanism for dealing with the way in which these competencies are to be exercised. So the answer I think, the short answer is no.

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CHAIRPERSON:

Mr Smith?

MR SMITH

Thank you Chair. I was going to ask him perhaps - any of

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the panels who know the answer, might answer. But is there any obligation on the Constitutional court when certifying a number of Constitutions - we could have up to ten Constitutions coming through from now on. Is there any obligation for them to certify in the order in which they were received?

PROF VENTER: I would say no. I don't know if my colleagues would agree.

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MR SMITH: And then what - sorry the follow up could they deliberately stall the certification of the Constitution without sufficient grounds?

CHAIRPERSON: Professor Majola.

PROF MAJOLA: I think that is a serious indictment to the court. No I don't - I don't think so. I don't think it would ever happen. I think the whole operations in a court of law is dictated by you know the workload, the technicalities and so. I don't think they would ...

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MR SMITH: Sorry Chair (inaudible) ... so it's essentially first come, first

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serve.

PROF MAJOLA: I don't think so. I think the case that is ready to be - to be taken on, it gets taken.

MR SMITH: So it's taken.

PROF MAJOLA: Yes.

MR SMITH: (inaudible) ... as far as I could go.

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CHAIRPERSON: Before - before there is Mr Leeuw (inaudible) ...

PROF DU TOIT: Siraki Leeuw.

CHAIRPERSON: Mr Siraki Leeuw.

PROF DU TOIT: Siraki Leeuw.

CHAIRPERSON: Okay, Siraki - Siraki Leeuw and then it's Dr Rabinowitz.

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MR LEEUW: Thank you Madam Chair, my question is very simple. I am understanding that the principles are received. How does one amend the principles?

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CHAIRPERSON: Professor Majola?

PROF MAJOLA: I think you cannot amend the principles.

CHAIRPERSON: Professor Du Toit have you got another answer?

PROF DU TOIT: Could I share something with you? A kind of anecdote. When these principles were written I had to talk with the person who is now a Constitutional judge and a very respected man. And I told him listen , these principles, now you have written - it will be difficult to get around them and you making the legislative discretion for the new Constitution a bit small and this chap told me, really it is bad luck.

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UNKNOWN: On a point of order Chair ...

PROF DU TOIT: Could I - could I - no I want to tell it. He said ...

UNKNOWN: No sorry Doctor Du Toit, if you can just hear me out please.

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CHAIRPERSON: Point of order.

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UNKNOWN: I am just wondering whether you compromising the person that you have spoken to, can you just think about it before you say anything further.

PROF DU TOIT: I'll stop.

CHAIRPERSON: Dr Rabinowitz?

DR RABINOWITZ: I wasn't going to say this Madam Chair, but I am guessing, I am sure you can do what you like with them - they're open to such (inaudible) ... interpretation But that was (inaudible) ... (inaudible) ...

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My question was - in relation to something that Mr Gordhan said, with strict taking away legislative power from the Provinces, and compensating for it by giving greater power to the centre. In other words, to the Senate.

Now that maybe theoretically seen as strengthening the Provinces in one respect. But if one looks at it now, in a way that the ANC always invites us to look at it - in the South African context, that in affect would not be granting any more powers to the Provinces, because the Senate operates

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largely, representing parties, rather than Provinces. So how would that be interpreted, do you think, by the court?

CHAIRPERSON: You've got the technical committee baffled here. Professor Basson.

PROF BASSON: No I won't venture an answer because I have read the ANC's proposals on the Senate and I don't think it would be correct to give it a straight answer on that.

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But I think - if I can venture a view on principle 18.2 - it doesn't say that the powers must not be less or inferior to those of the provided for in this Constitution. It says substantially less as we said and substantially more - I would say the word substantially denotes a certain discretion.

And it makes it very uncertain, this whole principle. it's not to say there are many of the principles are more certain and favourable of interpretation. But 18.2 it is more or less a qualitative or as Francois said, a quantitative evaluation.

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I would say it is collective. In end it would be a collective evaluation of whether the powers or the Provinces are less

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or more. So the question you are asking - whether you can exchange the two - the one for the Senate.

I would say on the Senate specifically, it depends of course how the Senate is composed. The Senate can be composed in a manner, such as the present Senate where the Senators are, I would say, primarily the representatives of the political parties.

But one could also change the composition of the structure of the Senate to make the Senators more the representatives of the different Provinces.

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But I wouldn't like to directly answer the question whether this would (inaudible) ... be the same powers as those who are presently residing with the Provinces.

PROF VENTER: Could I (inaudible) ...

CHAIRPERSON: Professor Venter.

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PROF VENTER: Without - without making any political comments, I do think that the Constitutional Assembly, in discussing these

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matters, will have to consider a question and that is whether the extension, increase, of the functions of the Senate at the national level, has to do directly with the position of the Provinces as is intended in principle - well the various principles - but amongst others principle 18 and principle 20.

Whether a change, if it is a change, at the national level, at the level of the functions of Parliament, direct - it reflects directly on the position, the Constitutional position of the Provinces as such, in terms of the principles. I wouldn't like to go further than that.

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CHAIRPERSON:

Give Dr King and then Mr Gordhan.

DR KING:

Madam Chair, I just want to, to make quite sure, Professor Basson mentioned it now, it was mentioned before as well, there was a reference - it was referred to before by, I am not sure who it was, again now by Professor Basson - not substantially less or more I don't think more comes into the picture at all.

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It says the party functions of Provinces defining the

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Constitution including the competence (inaudible) ... shall not be substantially less than or substantially inferior to - but there is nothing about more, so it could be more. We could increase the powers of the Provinces.

PROF BASSON: I am sorry if I mislead you, but I do agree with your interpretation.

CHAIRPERSON: Mr Gordhan.

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MR GORDHAN: The question is, whether if you would say the residue of power should reside in the Province. It's contrary to this Constitutional principle and the discussion.

PROF VENTER: I think madam Chair, the question requires elucidation. It depends in what is meant by residual powers.

MR GORDHAN: No all the residual powers in terms of this Constitution and the current situation reside with the National. If a party puts forward a view and there is no secret who does that, that the residual powers should reside now with the Provinces. Is that contrary to this Constitutional principle?

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PROF VENTER:

I think that would mean, Madam Chair, that the legislative and executive powers of the Provinces would be extended, enlarged, and that does not run contrary to the Constitutional principles.

But the difficulty in such a case would be to determine whether the balance - you know let me put it this way - the difficulty would be to determine whether the position of the Constitutional principles - no I am sorry, this is very complicated.

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Let me formulate it once again. The fact is that the Constitutional principles do not deal with the question of specifically - does not deal with the question of residuary powers.

The closest it comes to it is in principle 23. Where it says that in the event of the dispute concerning the legislative powers, allocated by the Constitution concurrently to both - and it cannot be resolved, then it will vest with the national Government.

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But that doesn't really deal with the essential question of

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residual powers. And again, I think the answer will have to be found in an interpretation of the whole of the text presented to the Constitutional court.

MR GORDHAN: Can I follow that up Chair?

CHAIRPERSON: Yes, Mr Gordhan

MR GORDHAN: Giving - giving having regard to the whole of the Constitutional principles, if there is a substantial diminution of national powers, would that be contrary to the Constitutional principles?

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PROF VENTER: It doesn't seem to me to be the case. Chairman - Madam Chair. I don't know what my colleagues might want to add to that.

CHAIRPERSON: Just before you come comrade can we hear one of the other technical people - do you want to answer - follow up on that?

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PROF MAJOLA: Ja, I just wanted to confirm that is how I see the position but of course, I think, one has to consider what powers of

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the national assembly are being taken away. You know because you (inaudible) ... them so much that it could be contrary to the Constitution.

CHAIRPERSON: Yes Comrade - we will come to you Mr Gordhan.

UNKNOWN: Ja, I just want ...

MR GORDHAN: Right I am just following on the same question. If Professor Majola says - with your permission Chair, that depending on what power you take away, it could be contrary. In terms of what provision?

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UNKNOWN: Principle 20.

PROF VENTER: I am not quite sure if I understand the question correctly Madam Chair but the Constitutional principles require the Government shall be structured at national provincial and local levels.

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Now that can theoretically be stretched so far or the reduction of national powers could be stretched so far that one could say we haven't got a sovereign, one single

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sovereign state any more. And that there is no real national Government. You know that's very theoretical.

I think what it does indicate is that there is quite a large measure of leeway. And in any case a very unlikely scenario.

CHAIRPERSON: Yes Comrade.

UNKNOWN: Ja, I just wanted clarity, very quickly Chairperson, because 10
Mr Gordhan's question was, to what extent would be the
reduction of national powers. I mean, conflict with the
Constitution.

Now, the response is, whether that would be Constitutional
I mean. The response was that, that would not be negating
the Constitution in any way. But again, this Constitutional
principle is it 13 - no-no 23 actually contradicts what our
technical experts say here. In terms of where the power
ultimately resides. 20

MR SMITH: Chair can I just add point to that.

UNKNOWN: 23.

MR SMITH: Chair can I just throw in the point that surely Principle 20 covers (inaudible) ... point.

PROF VENTER: Perhaps I should just clarify principle 23. I think principle 23 has a very limited application. Because ...

UNKNOWN: Just read it out.

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UNKNOWN: 13 sorry.

PROF VENTER: 13?

CHAIRPERSON: 13.

PROF VENTER: No-no that deals with traditional leadership. Principle 23 in the event of a dispute concerning the legislative powers allocated by the Constitutional concurrent international Government - is that the one that was intended? If that was the case Madam Chair?

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UNKNOWN: (inaudible) ... page 192.

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PROF VENTER:

The - that principle follows on a whole number of principles dealing with the allocation - the distribution of competencies between national and provincial levels of Government.

And it turns out, what it says, if in any situation, a dispute is not really appropriately covered by the provisions of the new Constitutional text, where it is impossible for a court of law to determine what the position is. Whether it should reside with the national or the provincial Government.

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Then the balance should fall to the national Government. But it is limited to a situation where the Constitution does not appropriately deal with the problem.

CHAIRPERSON:

Prof Venter, if I - if I can just ask - if now, say there is an agreement that for the final Constitution we agree that we list the powers of Provinces. Does it not follow automatically then that those powers not listed, becomes recital powers for national - or because I am asking this, because in our submissions you know - we are asked you know to list whether your party agree to list the national or the provincial.

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Well that and if we agree that we list only the provincial powers, will that be in contradiction with any Constitutional principle?

PROF VENTER:

If only the provincial powers are listed, that would be in confirmative with the present position of the present Constitutional text.

And that is one element of the determination of the quantity and quality - principle 18.2. So that shouldn't run contrary, I think to any Constitutional principle. Does that answer the question Madam Chair?

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CHAIRPERSON:

Yes, Professor Basson, you wanted to add, Senator Bhabha we'll come to you.

PROF BASSON:

Yes, I just want to add on to Mr Gordhan's question. About the national powers. I think we shouldn't forget principle 21 - which provides on certain grounds for the override of the national power of the central Government.

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Therefore I wouldn't think one could diminish the central Government to such an extent it would infringe upon those

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overrides, containers in principle 21.

CHAIRPERSON: Senator Bhabha and then Mr Smith

MR BHABHA: I am coming back to principle 20. The use of the word appropriate and adequate legislative and executive powers in the light or be consistent with the use of the word later in the principle, national unity.

Now, what meaning would you attach to the word appropriate and adequate legislative authority? In principle 20 - bearing in mind what national - the word national unity is used later in the principle. Could you give us a commentary on that please? 10

PROF VENTER: Could I, madam Chair, refer you to the presentation last week - bottom of page 6 and top of page 7. And just add to that in general that the appropriateness and adequacy of the allocation is focused on something specific, namely that each level of Government needs to be - enable to function effectively. 20

Now those are very general terms. That's why I mentioned at the top of page 7 - this is a conglomeration of criteria

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which does not provide positive indicators for the formulation of the relevant Constitutional provisions.

But what it does do is to make it clear that each level of Government, national, provincial and local, must have legislative and executive powers.

Which executive and legislative powers are allocated need then to be judged against the background of enabling those Governments to function effectively.

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CHAIRPERSON:

Mr Smith.

MR SMITH:

Chairperson, Professor Basson made reference to overrides in principle 21. I am not sure that I can see any. But I see criteria for the allocation of powers - but I think from that, one form of concurrence could be overrides. But unless it is a slip of the tongue, I don't think - unless - unless he believes and perhaps I am asking through you.

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Does Professor Basson believe that Section 21 - principle 21 actually provides for overrides clearly.

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PROF BASSON: I think what I was trying to say is that to provide by overrides would not be inconsistent with the Constitutional principles.

PROF VENTER: If I might add Madam Chair, in the draft that I presented at the end of my little paper last week, it is - I tried to indicate that principle 21 really does require what is popularly called overrides.

But there are different ways in which it can be formulated and one I have formulated there is one specific approach. To my mind that formulation will satisfy the requirements of principle 21. 10

CHAIRPERSON: We will take two more questions then we will wrap up. Can we have Senator Bhabha, Mr Smith and then Mr Gordhan.

MR BHABHA: Principle 21.2 says, where it is necessary for the maintenance of essential national standards etcetera. May I ask - who establishes the national standards? 20

UNKNOWN: The Provinces.

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MR BHABHA: No just wait a minute - just wait a minute.

UNKNOWN: No further questions.

MR BHABHA: No further questions, who establishes those national standards, because that seems to be the senna qua non for National overrides.

PROF VENTER: The (inaudible) ... we discussed earlier on in the framework and we have been working on this afternoon, would be the starting point. To decide really what the national - essential national standards are - would I think primarily be a matter of sorting it out inter Governmentally.

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And only in the event of that not being possible, where a deadlock situation is reached. It would have to be presented to a court of law. The Constitutional court. And then the Constitutional court will have the very difficult task to try to establish objectively what essential national standards are.

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And courts of law are quite good in doing that. To applying objective standards to a set of facts, but that would be the

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final solution.

CHAIRPERSON: Mr Smith?

MR SMITH: Chair, the - I think the feeling we all have obviously is that within the parameters of the principles, there are various options available to us. And if we discount the extremes, there is a core in the centre that ranges from mid centre to mid left.

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UNKNOWN: From mid centre.

MR SMITH: And we are very middle of the road when it comes to this kind of thing. So I am was going to ask the Professor - I mean Professor Venter, for example has got a reformulation of schedules - I mean of 126 and he does admit there are a variety of reformulations that could take those.

I think it will be quite interesting would be to see some other formulations that you believe as a group of experts, that comply with the principles, but are deliberately taken to extremes that you can create on both sides.

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That will be an interesting exercise for us - because then we can use that to judge the entire set of principles and that internal coherence with principles, that we are all talking about, but we can't really get a handle on.

PROF VENTER: I can just say that would be an exhaustive - exhausting task to undertake to try to draft every possibility - but it might be a good idea if ...

MR SMITH: Just a correction, just two - just two.

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PROF VENTER: It might be a good idea if one of my colleagues were to draft something, you know as a different approach.

DR RABINOWITZ: Madam Chair can you (inaudible) ...

CHAIRPERSON: Yes just switch your mic on.

MS RABINOWITZ: Could one perhaps look at it particularly from the point of view of structuring that in terms of framework legislation? Various types of framework legislation. Framework legislation which provides for norms and standards and framework legislation which provides for general principles

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and for co-ordinating principles.

PROF DU TOIT: We mustn't waste the time of our experts too much.

CHAIRPERSON: Mr Gordhan?

MR GORDHAN: And I want to agree with Mr Smith. That it would be very useful to have other samples, but the question I was going to ask Chair, the first one was.

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If Professor Venter's draft or redraft to 126 is an example of an override, one would like know what are the other types of overrides. And I think it will be very informative for all of us to have that.

And if we have three or four examples of that it will be very good.

The second one relates to principle 21 again. Surely it is within the prerogative of national Government, for example, in housing, to say that it is setting aside X amount of the funds for housing subsidies. And that for the use of those subsidies, this is the standard.

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ie. anybody earning less than R500 get this, anybody earning less than R1,000 gets that and so on. And that becomes a national standard then and it legislates on that basis. I am just using one example.

There are other examples of national standards as well. Now that's surely not a matter which must be determined inter Governmentally. There can be consultation inter Governmentally.

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But ultimately, national Government has the right to legislate on that matter. True or not true?

PROF VENTER:

Madam Chair, the eventual test for the Constitutionality of the laying down at a national level of national standards would in first place have to be whether they are essential and whether they are reasonable. I would also submit.

Should somebody - it doesn't matter whether it is a provincial Government or for example also a local Government, or even possibly an individual, argue before the Constitutional court that the piece of national legislation laying down national standards is not reasonable within the

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framework of the Constitution. That would be an argument that the court will have to consider.

I think the principle where it allows for national legislation to lay down national standards, does not give an unqualified legislative competence to Parliament as it chooses.

It will have to be balanced within the context of the whole Constitution and even in the context of the structure of Government and the allocation of powers and national level - national and provincial level.

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If it, for example, had the effect of excluding all possible intervention, legislatively and executively of provincial Governments, I think it would be arguable that would not be reasonable national standards.

On the other hand, it can't be limited to such an extent that Parliament is powerless to legislate sensibly for objective - objectively required standards which can be justified in the circumstances of the time.

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CHAIRPERSON:

I just have got one last question, just for information -

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Professor Majola mentioned that by the 1st of November, the Provinces must have completed their own provincial Constitutions.

I want to know if anybody is aware of those processes, currently, I mean, in the provinces, are they busy writing their Constitutions, because at the end of the day he also says - they must conform to the Constitutional principles, they must conform to the national Constitution and I don't - can't remember that I have read anywhere about any Province unless you know who is busy actually writing their own provincial Constitutions and how are they doing it. Just for my own information, I don't know what the situation ...

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PROF DU TOIT: Majola has given it up.

CHAIRPERSON: Are you aware of any Provinces busy writing the final, the provincial Constitutions?

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PROF MAJOLA: Madam Chair, just a slight correction. I don't think the comment came from me.

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CHAIRPERSON: Okay.

PROF MAJOLA: But I am not aware of any Province that is busy with their Constitution.

PROF DU TOIT: No - no that's not right.

PROF MAJOLA: Just to get back to the question by Mr Gordhan, I think it is an interesting question about national standards. I am thinking of the situation where Provinces might face a minimum wage at about R50 an hour and then the national Government comes and sets a National standard of R35 an hour, you see, and whether the national Government can then say this is in the national interest - we are setting national standards.

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Obviously that, it would have to show that it is necessary in the national interest, but the Provinces might win the case by showing that they have actually put up or adopted a better standard and even better standard and than we should then mean therefor the national Government would be told to drop it's act, to withdraw it's act, Thank you.

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UNKNOWN: A follow up question please.

MR SMITH: What's there to follow up?

UNKNOWN: (inaudible) ... was the (inaudible) ... between normal and standard?

CHAIRPERSON: What is your question Peter?

MR SMITH: (inaudible) ... possibility in norms and standards if one 10
(inaudible) ...

UNKNOWN: Go read a good book, there are plenty of good books on the matter.

UNKNOWN: Sorry, the example that the Professor has given on who is the onus to show that it is complied with the standard? Is it on the Province or is the onus on the national Government now to say that you have not complied? In the example that has been given. 20

PROF MAJOLA: I don't get the question very clearly. Whether you say - obviously the national Government cannot be the judge in

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it's own case here. Because I think the whole, the principle is couched in some kind of objective fashion and I would like to (inaudible) ... with Professor Venter that you would have to have an independent boarder to decide whether the national standard was necessary or not.

I think the principle says that the national Government can intervene only when it is necessary to set the national standard. I don't think that the whole question relates to the compliance with the national standards. I think it relates to the setting of the national standard.

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CHAIRPERSON: Thank you.

PROF VENTER: Just to add Madam Chair, the question of onus I think would really only come up when the matter goes to court. Because the question will then be - is this act of Parliament, Constitutional or not.

And then it, I think, procedurally, normally one would expect that the party who avers that the law is not Constitutional would have to prove it. The primary onus would probably be on that party.

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CHAIRPERSON: Thank you Professor Venter. We have just got one announcement to make before we close.

MR CRONJE: Madam Chair, just before you close, on the factual question of writing of Constitutions, Natal have actually started the process by having now a Parliamentary Constitutional committee. And they are now at the stage of looking at programme and what, what, what - so they are doing it.

MR MXENGE: We have got an announcement from the administration - members are reminded you know to - to get us information on their addresses - you know their contact numbers and the decide and the (inaudible) ... If you remember as from last year we used to send members documentation you know via the post - and we set to do the same thing during this coming recess.

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And we wish that you could co-operate with us in this regard. I have a list of members who are members of Theme Committee 3 but for whom we don't have any information, that is addresses or telephone numbers - that is recess telephone numbers or and recess addresses.

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Those names are M. Abraham, Dr MS Appelgryn, ZA Dingaane, MJ Golding, Rev AD Goosen, OT Corban, H.J Lutz, NI Mabude, MS Manie, SM Malibu, NN Mapisa-Nqakula, SJ Mongwaketse, SD Montsitsi, DM Zinende, and MA Sulliman.

If those members are not in the house at the moment, could you please convey the message to them and get those - that information. We need that information before the end of the week.

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CHAIRPERSON: The Core Group must stay.

MR MXENGE: And the Core Group will meet immediately after the adjournment, thank you.

CHAIRPERSON: Thank you very much.

[END]

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THE CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

3 APRIL 1995

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