

# **CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 4**

**8 FEBRUARY 1995**

**[ VOLUME III pages 134 - 219 ]**

**VENUE:**

**GOOD HOPE CAUCUS ROOM**

**WORKSHOP:**

ON RESUMPTION:

CHAIRPERSON: Do you want to start?

PROF BREYTENBACH: Yes. One or two comments about residual powers. In modern Constitution, one does not have both residual powers and listed powers. Usually what one finds is either listed powers (shopping list) and then all the rest (non-listed) are then residual.

In Centralised Federations for instance like in Canada, one 10  
would find that it is the powers of the provinces that are listed and then all the rest "so buite die Here se genade" then and all the rest goes to the central level. That is the reason why Central Government is stronger when regional powers are listed.

We tend, with the Interim Constitution to fall into that category. Alternatively the United States and in Germany are models of decentralised federation. In those cases it is in fact the central government's powers that are listed and 20  
all the rest being left over as residual powers to the provinces.

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

Therefore they may deal with issues that were not necessarily intended, they may deal with abortion, they may deal with horse racing on Wednesdays and on Saturdays and that kind of thing so one can add and subtract as that level of authority seems fit. So this is the crucial distinction that one finds in particular Federal Constitutions and there is no particular federal model. As I said, there are two kinds of federalisms, the centralised variety and the decentralised variety.

10

Just to remember, in the centralised variety, one finds that the powers of the provinces are listed, as in our case there is a shopping list of 29 and all the rest ends up with the Central Government and that is the main reason why I argue when I got the question from Patricia de Lille "what is our Interim Constitution by definition" I had no hesitation to say I think it ought to be categorised with a lot of footnotes and it ought to be categorised in the centralised variety and I saw Dennis Davis (I do not see him now) he nodded, he agreed with my assessment and what informs me 20 basically is that the powers of the provinces were listed, and if they are listed, they cannot be more. There are 29 items

**CONSTITUTIONAL ASSEMBLY  
WORKSHOP:**

and it cannot be more.

Concurrent, which is the second point that we deal with here, it is usually where two levels of the political system could exercise powers on those items concerned. It has also got to do with this concept of framework legislation, alternatively known as alternative powers. What one usually finds is that concurrent powers and residual powers are usually exclusive.

10

Concurrent powers and exclusive powers are definitely exclusive because it is inconceivable to give one level, either the first or the second. Say Canada and America are two good examples. In one case it is the central level that is listed, that is in America and therefore limited, so all the rest ends with the 50 American states, whereas in Canada just across the boundary, it is where the provinces' powers are listed and all the rest goes up to Ottawa.

So there we have two examples of two different kinds of 20 federalism that are actually adjacent to one another but the point to be made is, on exclusive powers, that level of

government whose powers are listed are in fact therefore exclusive. If it is listed for the central level as it is in the case of the United States, then it is exclusive, which is war, defence, post offices and a number of big issues which are listed, in the case of the United States, and therefore a small list of exclusive powers.

Whereas in the case of Canada for instance (and we fall into the Canadian model there) is that the provincial powers are listed and as far as I could gather, working through the Constitution from top to bottom, bottom to top, I could find which is on page 1 of my document handed out to you, I could find only four exclusive powers for the Central Government, only four. 10

One was Finance, Section 60. The other one was Foreign Affairs, that is Principle 21 (iii) and the other one is National Economic Policy, Principle 21 (v). These are the only powers that the Central Government in South Africa can exercise by virtue of the fact that it has been listed as such. All the rest, all these, this is a list of Madiba's cabinet that you see there. 20

The Constitution does not authorise him explicitly to do so. Because they are residual, he can actually do whatever he likes to do, with the proviso, is that the Executive in South Africa has only 30 members because the Constitution says so. If one subtracts the President and the two deputy Presidents, then there remains only 27.

That is the reason why you will find there are only 27 lines here, but what the State President thought fit, or wise, was simply to add to some ministers, more than one portfolio. 10  
So although we have only 27 ministers, there are actually 36 portfolios.

It could be 76, it could be 160. There is nothing in the Constitution that prevents Mandela to have 120 portfolios on the central level because the Constitution is silent on that, except if it were to impact on powers that may, in terms of our Constitution, be allocated as exclusive powers to the provinces. This is where the debate comes in which is a complicated debate on our provincial powers which is my second page of that document where our provinces do 20  
have original powers because they were listed (the shopping list in schedule number 6.)

They also have since the Constitution was amended before the election in the early months of 1994, a year ago, there were overriding powers built in for provinces there and it was supposed to be exclusive, and the word concurrent fell away, which gives the impression as if there shall be prevailing powers for the provinces henceforth.

But if one looks at the pre-conditions stipulated in this very Section 126 (iii) of the Constitution, five provisions in terms of which the provincial override shall be nullified, then it 10 raises the issue which I cannot conclusively answer whether we indeed have provincial overrides as the Constitution, after a superficial read, does suggest that the provinces do have overriding powers.

But looking at Section 126 (ii)(a) which restores a form of concurrency for central government, and looking at 126 (iii) that has these five criteria in terms of which the Central Government can have and override again over the Provincial Government, that leaves for me the issue where we should 20 classify our provincial dispensation highly unsatisfactory.

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

It is ambiguous and it is going to, if it remains like it is now it is going to be one of the major problems of adjudication and interpretation by the Constitutional Court on how to interpret these issues.

Now this, in short, is then what, I have spoken a lot now, first Exclusive, then Concurrent, and just to conclude with the third aspect that I was also asked to address, which is this whole issue of Residual Powers.

10

Residual Powers is simply, it is all those other powers not listed. If you are looking for an easy definition of what is residual, then it is those that are non-listed. It is simply subtracting those items that have been listed, then it is all the rest and just remember this one, according to our Constitution there is no numbering of the powers of the Central Government, whereas when I listed the powers of the Provincial Government, I listed them exactly up till 29 because this is exactly how Schedule 6 of the Constitution lists them.

20

Therefore they have got numbers, they are listed but in

**CONSTITUTIONAL ASSEMBLY**



**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

terms of the Central Government, Madiba could appoint as many Ministers, not as many Ministers, as many portfolios as he liked, provided he divided it through the 27 Ministers that were physically available.

I think we have got 28 Ministers now if one does count in the Minister of Finance, there was a special Constitutional amendment because Mr Liebenberg was not a member of the National Party, so it does not form part of that formula, so I think we actually now have 28 Ministers but for that we 10 had a special Constitutional amendment to be made so that, I think, concludes my assessment of these three powers. Just to remember, residual refers to those powers that are non-listed.

**CHAIRPERSON:**

Okay. Richard?

**MR HUMPHRIES:**

Thanks. I have got the easy task of saying that in terms of a unitary state model, exclusive powers does not apply in the sense that it does apply to a Federal State. However to the 20 extent that one could argue that its spirit applies in a Unitary State, it vests everything in the Central Government.

**CONSTITUTIONAL ASSEMBLY**

The concurrent powers, you cannot have concurrent powers in a Unitary State. It would be possible to have it in a Regional State but with the proviso (inaudible) ... and overriding powers to the Central Government to overrule the Regional (inaudible) ... by definition. Thank you.

CHAIRPERSON:

Okay. Are there questions please? Doctor Maree?

10

DR MAREE:

Mr Chairman, can we link these concepts to the financing, concurrent powers on financial sharing on projects or matching. Is it not that all where powers where you are, or province can have the power to do something but they must finance it.

Is it not that, especially when you look at the German system, concurrent is very much where the Federal Government assist in the financing but that you have some matching from the "Länder" and the implementation lower 20 down? Is it because you do not link the two for me and I feel that is an important aspect when you define the

different concepts.

**CHAIRPERSON:** Okay, do you want to reply to that?

**PROF BREYTENBACH:** Well the intervening mechanism therefore is really what the Constitution or the system for inter-level governments, inter-level collaboration, that depends what the Constitution applies and it is usually, the Constitution are usually quite explicit on this point. What kind of provisions they contain for fiscal transfers. The other word is equalisation. 10  
(Inaudible) ... each and every system.

The German Constitution, the American one (the Constitutions that I know) have some or other clause that specifically deals with how the mechanisms ought to be. In the German case it is quite exhaustive, involving also the Senate, involving the committee of "Bunt unt Länder heads" (it is land and central government Heads) so there are mechanisms provided precisely for dealing this, and that is usually provided for in the framework legislation. 20

The framework legislation that deals with concurrent powers

but how concurrent powers work, so framework legislation actually very, very important in providing the structures for how a system has got to inter-link, because if I do have a criticism of our Interim Constitution right now, it explains, it defines a lot of institutions but they are almost like "bokhaal" you know, like bird-shot.

They are all over the place. They are not really inter-linked in terms of how the Senate links with the provinces, how the province is linked with the Financial and Fiscal Commission, 10 how the Fiscal Commission inter-links with the Central Government. We do not really know, all these conventions ought to develop and this is one of the major weaknesses in our existing Constitution, it does not really provide for a system of inter-level collaboration.

**DR MAREE:**

My argument is, when you look at the German system of concurrent powers or you find that the financial, the matching of (inaudible) ... you decentralise certain functions or you say certain functions are the joint responsibility 20 because the Länder really cannot finance it in total. Now you have the Federal Government finance it but it may a

matching type of finance and that is where your concept of concurrent powers are coming in.

Whereas if a Länder is, can finance on their own then the question of the whole aspect of subsidiarity is coming in and you do not have the concurrent approach so I link the concept also ...

**PROF BREYTENBACH:** No I take your point but concurrent also means, and this is my basic interpretation, concurrent means that a specific function, as identified by the Constitution, can be handled 10 by either one or two or even more perhaps, levels of the political system. What we talk about here is mainly central level and provincial level.

Concurrent would mean that there is an item, a function and that function could be abattoirs but it might mean - on abattoirs as well the central government also the provincial government can exercise powers there too and that is where your framework legislation comes in to provide for and in what cases would it go upwards and what case would it go 20 downwards. Getting to your problem which is the crux of the matter, really finance, what kind of finance is

concurrent, what kind of finance is non-concurrent, which is exclusive at the central level and which is not exclusive to the central level and that is the crux of the debate about more or less federalisation.

**CHAIRPERSON:**

Okay, could I just get some clarity before we move on? When we have concurrent powers which means that both levels, central and financial can actually make policies on a particular issue, but what decides which of these two levels prevails?

10

**PROF BREYTENBACH:**

If it is written into something it has got to be written into the framework legislation. If there is no framework legislation, that is more work for the Constitutional Court to adjudicate because otherwise there are no rules, and in that case rules develop not through legally binding rules such as statutes or an amendment of the Constitution then they simply develop through convention which is practised over a very long period, as in Switzerland and in Britain there are many conventions that has been developed since the days when those societies were basically illiterate.

20

I mean the Swiss system was developed since the days that there were illiterate cowboys in the mountains and nobody could read or write. So clearly you could not write these rules but these rules became convention from generation to generation. That is the reason how they know it but in modern times one cannot really allow for convention to take route, particularly if one works with modern things, quick decision-making and so on, so it does require rules.

In a modern system, framework legislation plays the role 10  
that convention played, say in pre-literate times as one  
would say that Switzerland might have been 900 years ago.

**CHAIRPERSON:**

Praveen and then the gentleman there, and then Patricia.

**PRAVEEN:**

I am just wondering whether in the South African context,  
the concept of framework legislation is a bit premature, that  
in a sense we have a developing system and what has  
happened since the latter part of last year is that in each of  
the disciplines, particularly the more important powers 20  
mentioned in Schedule 6, national departments and  
provincial departments and Ministers have actually

developed a co-operative relationship.

They have set up forums where matters are discussed, where policy delineations are taking place, where functions of each level are being ascribed and I think that that is a much better route to take in our circumstance at this point in time. Then maybe X years hence we can now talk about being more explicit in terms of the legal formulations themselves.

10

As I, or from my limited understanding of framework legislation, what we will be doing if we follow that route now, is that we will be prescribing for ourselves without too much of experience being gained, what the limits of national functions would be, right at the outset. Therefore the experience that we develop possibly over the next five to ten years is going to be quite crucial to the ultimate formulation if this particular aspect takes us in our own situation.

**PROF BREYTENBACH:** Absolutely correct. There is only one proviso, is that 20  
although the Constitution should perhaps not be too  
prescriptive in the medium term because we simply do not



**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

know what the practice is, that the Constitution should not stick its neck out and provide too much, to be too prescriptive.

What the Constitution ought to be is to keep quiet. It should allow for it if it does not want to provide for it. It must allow for it that it is legal and also Francois Venter made the point just before lunch when we ended up this morning's discussion on asymmetry, when he said that the existing Constitution does allow for it and I fully agree. The 10 existing Constitution does allow for it but it does not provide for it.

Now there are some people, the Federalists in our midst who wants that the final Constitution should also provide for it but at least we are at a half-way stage where one can say that the Constitution does allow for asymmetry.

It does allow for a lot of these issues, it does allow for things that might one day be encapsulated under framework 20 legislation which right now we simply do not know our own unique conventions are going to happen but then we must

**CONSTITUTIONAL ASSEMBLY**

**WORKSHOP:**

be cognisant of the fact that we should not write the Constitution as such, that lawyers come afterwards and say "listen but this Constitution does not even allow for it" that we must be cognisant of.

If it does not provide it must be sufficiently flexible that it allows for it so I actually go along with the sentiment, the thrust of your argument.

**PRAVEEN:**

(Inaudible) ... follow this up Chair with one question. We have talked about the German example where the concept of framework legislation is used to govern this relationship between centre and province. Now for example in Canada or India or Italy or Spain, what is the mechanism or technique in their Constitutions in this regard? If you do not mind, if we can just get some insight into that, if either of the could ... 10

**PROF BREYTENBACH:**

They have got a different Act in addition to the Constitution. Germany for instance has got what they call the basic law, the "Grünt" law, so the basic law which is in addition to the Constitution, it is a kind of an extended preamble, where it does contain some of these points. The 20

closest that we get to it is our 34 Principles and the 34 Principles vague enough to be taken as a point of departure but not sufficiently vague that it does become prescriptive, so I would argue that our 34 Principles play the role that some of these framework legislation "Grünt" law etc. in Germany play. That is the cue from where things are taken and from that point of view that it would actually be nice as it is, I think, that our 34 Principles are not too prescriptive.

**PRAVEEN:**

(Inaudible) ...

10

**PROF BREYTENBACH:**

The techniques available has got to do with the practices as they develop around equalisation of funding. It has got to do with the practices in conventions, also through interpretations of the courts of law.

In both the United States and in Germany the courts of law do play an important role in interpreting the Constitution and these interpretations then become part of the convention, these set patterns and examples, so the further 20 evolution of the Constitution in either this way or that way takes place clearly through political intervention,

representatives of the people are represented in Parliament, but I would say that is of lesser significance.

Of more significance is even the case of the United States, as Dennis Davis spelt out this morning, where the Supreme Court (they do not have a Constitutional Court) where the Supreme Court in the United States actually plays a very important role in interpreting the Constitution and in giving direction, so much so, that on fundamental issues American practice differs from administration to administration. 10

When it was Nixon it was this kind of thing, then it was Johnson it was that kind of thing. Then it was Raegan it was this kind of interpretation, on issues such as affirmative action for instance. Now it is again the other thing and there it is mainly the Supreme body that interprets the Constitution in terms of public policy as determined by the wills of the electorate, is through the Constitution.

In the American case, appointment of judges are much 20 more of a political process. With us it is not or not yet, so one can load the pegs with representatives that are perhaps

more akin say to greater society thinking (it is a term that Johnson used) as opposed to other people but this is how this process evolves. So one should not, you should not ignore the contribution that you as representatives of the people, can make but then also alternatively extra-parliamentary the role that the Courts play.

**CHAIRPERSON:** Okay (inaudible) ...

**UNKNOWN:** Chairman, would it not be advisable to get a senior partner 10  
of the Government of National Unity to get Mr Allen Boesak to advise them on the use or abuse of financial powers.

**CHAIRPERSON:** That is out of order, really I must rule that out. Altogether  
uncalled for and really, look we have got very limited time  
so may I urge people who are going to contribute not to be  
facetious and unnecessarily provocative. This is not a  
Theme Committee. It is in fact a workshop. Please, it is a  
workshop where we are meant to look at things relative and 20  
dispassionately.

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

Now in the order in which the hands came up. It was Pierre, Ruth. Oh sorry, well it is Ruth, Mohammed Bhabha, the gentleman behind there and is there anybody else? Now I must urge also that we allocate no more than five minutes to this because that leaves us the remaining 25 minutes to look at Fiscal and Financial Matters more assertively. We will take Patricia as well. So in that order please.

**RUTH:** I would like to (inaudible) ... you said that one of the greatest problems in our Interim Constitution was 10 (inaudible) ...

**CHAIRPERSON:** Can you talk louder please?

**RUTH:** Yes. You said that one of the problems of the Interim Constitution was the way it provides for concurrency, although the word is not there, in effect, the powers of concurrency and you said it will create an opening for a great deal of litigation and conflict.

20

At the same time you said that we should not be prescriptive and that we need to wait and learn from the

**CONSTITUTIONAL ASSEMBLY**

future. Yet you said that the Constitutional Principles play the same sort of role as framework legislation but you rejected framework legislation. Now what kind of a system do you regard as being the best if concurrency is no good, if framework legislation is no good. Although framework legislation is similar to the Constitutional Principles which are really just providing a framework for us.

**PROF BREYTENBACH:** Ja, the whole thing could be simplified if we are certain about what is listed, on which level and the rest is being residual, that is the other level. If one solves that, that is the overriding (German word "groepsnorm") then we do not need to quarrel and argue about what is concurrent more or less because now we have more or less concurrency. 10

Section 126 (ii)(a) is a "deurmekaar spul." One simply does not know what it means because it pretends to give an override to provinces, yet it restores concurrency for Central Government and then comes Section 126 (iii) that gives Central Government four, five more reasons in terms of which they can authorise in the sake State's interest and so on. At the end of the day this is going to be a rather 20

"deurmekaar spul."

So I would think that this whole thing could be solved by focusing simply on what we list and decide which level is going to be listed, the American model or the Canadian model just to explain it and the rest of them on the other level and then maybe there are other techniques as well but my humble view is that we could solve a lot if we made up our minds what we are going to list and what we are going to regard as residual. "Francois daar agter?"

10

**CHAIRPERSON:**

Francois are you coming in immediately on this? Okay.

**PROF VENTER:**

Thank you Mr Chairman. I think I had better jump in here now because I think this Section 126 although it is very complicated it is, or because it is very complicated it is very much misunderstood. That is the section that deals in the present Constitution with the distribution of powers between the National and Provincial Governments. We must remember where we come from.

20

We were in a certain sense not a state composed of various



**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

provincial elements. Since the 27th April last year, South Africa is in the process of transforming itself, amongst other things, from a unitary state into, let us call it a Composite State. In other words the provincial level of government in all respects had to be, or needs to be still to develop, to evolve. That includes the taking of powers at provincial level and that is why Section 126 reads as it does.

It allows for a process of the establishment of provincial government by means of allowing the provinces 10 systematically to lay claim to certain powers and functions by making laws, and by having functions and powers allocated to them by means of presidential proclamation and so on.

Now that is a process that is going to take a long time. It won't be finished by far, to my mind, when the next century begins and therefore one should be very careful in trying to mechanically and artificially hastening the process of identifying powers which must at all costs be at the 20 provincial level.

Can I just, I am sorry I am taking so much time but can I just explain how this really works? There is the schedule with the list of what functions, not powers but functional areas, and Section 126 allows both the National and the Provincial levels of government to legislate on those areas, but if a province makes a law within one of those functional areas then Section 126 (iii) comes in, saying whether the Provincial Law will prevail over the parliamentary one or not, and if it falls completely within the schedule, it is a provincial matter and that specific province, asymmetrically 10 by the way, then has that power to go on.

To my mind it is a developmental formulation which allows for a sensible evolution of a completely new provincial system. Thank you.

**CHAIRPERSON:**

Okay, Mohammed Bhabha?

**MR BHABHA:**

I have a question here, the vertical relationship, the question of onus of proof related to the doctrine of ultra (inaudible) 20 ... for clarity I want to know, first of all in a classical federal system, in a classical unitary system, where does the onus of

proof lie and who decides, or rather where does the onus of proof lie to see or to establish whether a particular tier of government has acted out of (inaudible) ... - just for purposes of clarity.

**PROF BREYTENBACH:** I am sorry, you must come in here because I cannot answer that at all because I simply do not know which is supposed to be in our case and in the rest of comparative Constitutions out there, one will find that this varies from Constitution to Constitution. Francois, do you have a better 10 answer to that? Onus of proof.

**PROF VENTER:** Well, normally Mr Chairman, the person or instance averring that the area of competence has been transgressed, must prove what it is saying and the standard is the standard provided for, or standards provided for by the Constitution and the arbitrary is the court. Either the Provincial Courts or the Constitution Court eventually.

It is a matter of interpretation of the Constitution and that 20 is why Section 126 makes sense by not using, banding about unnecessary words such as exclusive and concurrent but

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

providing a list of standards against which the position can be measured according to objective criteria to be determined by a court.

**CHAIRPERSON:**

Can I just appeal that, I know it is difficult but when people are referring to the Constitution that, just to refer to a particular section sometimes is not very helpful to all of us. If you can just explain very briefly, and even terms like onus of proof, I mean I still do not know what it means precisely so if we are using terms like that, if you could just explain 10 because we do not want to be dominated now purely by those who have legal expertise.

May I urge on the people who speak in future to just assist and take it that many of us here do not have the necessary legal background or familiarity with the Constitution. With that said, the people who are going to follow it up, the bloke, the gentleman behind, next to Solly Manie, and then it is Patricia de Lille.

20

**UNKNOWN:**

I am sorry, Senator Bhabha and Francois read my mind so I am covered.

**CONSTITUTIONAL ASSEMBLY**

CHAIRPERSON: You are covered. Patricia?

MS DE LILLE: Chairperson, my question is not to the panel but I am looking at the provincial powers and the Interim Constitution does provide that in the final Constitution we cannot give the provincial, I mean the provinces, less than what it is provided for already. Now what I am interested to know, I am a bit curious to find out from those people who want a Federal State, what are the other powers that they want to have to have as exclusive powers, that they 10 think will, you know, contribute to making them, I mean to bring about a Federal State.

Right now there is also this debate where there seem to be some provinces are saying that look, we do not have enough powers and, but they have never come out very clearly to say that look, we want this power or that power that it is not assigned to us now, it is exclusive in the Interim Constitution but just for the purposes of the debate, I would like to know what other exclusive powers the Federalists wants to add to 20 provinces' concurrent powers that they have already.

CHAIRPERSON:

Anyone who wants to briefly comment on that? Peter, yes, needless to say.

MR SMITH:

Sure (inaudible) ... it is a complex story so I mean it is not a question of which more powers we want, it is a question of the whole structuring of the relationship between the levels which starts from basics and the basics from our point of view would be a classic formulation whereby the Central Government would be assigned those powers which the provinces are not able, or should not be able to deal with on 10 their own - National Defence and Foreign Affairs and Monetary Policy - the standard issues, and then residual powers are left with the provinces.

So automatically that would cover that, all of Schedule 6 items would automatically be subsumed within that category of residual powers. But the more elderly would argue that there are a number of mechanisms for regulating the relationship between the two levels. You know, the issue of concurrency versus exclusivity and framework legislation and 20 general principles underpinning the kind of legislation that provinces are able to grant.

Our view will be that we will prefer a mutual exclusive powers so the Federal Government's powers would be exclusive as would the residual powers of the provinces, but as the case was mentioned this morning by one of the speakers, if you take this system of that kind, that does not mean that the National Government for example, is not able to intervene where necessary in an area which is normally exclusively a provincial matter.

If you take the issue for example of inter-preferential 10  
commerce as used by the, in the US example, so you would  
have a situation where for example (I will take some silly  
example) making biltong. You make your own biltong and  
you can do what you like with it in your own province but  
as soon as you start exporting it to Gauteng or somewhere  
else to sell it, then the National Government will be able to  
regulate that trade.

So even though it is, you know, you have exclusive  
competence in an area, in really things are not necessarily 20  
totally exclusive, and so this is sort of a rough view of what  
we would like to see but I am not sure that answers

Patricia's question. I mean it can be very more detailed than that.

CHAIRPERSON: Ruth, very briefly.

RUTH: (Inaudible) ...

CHAIRPERSON: Mike please.

RUTH: I am just a layman I see it more from a simple point of view 10  
than from an expert's point. It is not necessary that we  
would start out by wanting to demand more powers than are  
in Schedule 6 but we would want greater clarity. It is what  
Professor Bezuidenhoud said just now about the confusion  
and the litigation and the fact that it is given, then taken  
and then overridden.

It is very complex so that in actual fact the provinces do not  
really know where they stand and they can have the Central  
Government intrude on the way in which they govern those 20  
particular schedules, plus that we want residual powers,  
which means that all those that are not listed inevitably are



legislated by the province rather than being legislated by the legislature of the Central Government, which gives the potential for growth of legislative competence in the province rather than in the centre. Layman's answer.

**CHAIRPERSON:**

Okay, can we move over then, we have got 15 minutes, no more, left. We will look at Fiscal Powers and a bit on Economic Unity there, so Richard is going to start off and then we will take questions.

10

**MR HUMPHRIES:**

Thanks. You know, I think the major difference between a unitary state and a federal state in terms of fiscal powers is that in federal states fiscal powers are firstly - or to start off I will talk about one aspect of fiscal powers to begin with and that is the distribution of finance between the chairs of government.

Although a unitary state clearly does not have tiers of government other than central and local, I think it could be argued that a similar process occurs behind closed doors in a unitary state when decisions are made about the allocation of public finance as would occur in a federal state through

20

explicit mechanisms like the Fiscal and Financial Commission or similar such structures, and that is that a unitary state would not be able to get away with, generally, a situation where decisions about the allocation of public finance blatantly favoured one area, or areas, over other areas, and that kids going to school in Scotland for example, you know, had pupil/staff ratios twice that which applied in England.

So public finance in the unitary state still pays a great deal 10  
of respect to ensuring that public finance is spread equally  
across, there are no tiers of intermediate authority which  
have revenue raising powers. So the allocation of public  
finance in a unitary state takes place without due regard to  
whatever regional differences might exist, and to the extent  
that in a federal state such structures like the FAC were to,  
or existed, that ought to be one of the criteria which applied  
thereto.

In terms of economic unity in a unitary state there can be 20  
no competition between different regions in a unitary state  
because those specific regions do not have revenue raising

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

powers. In a sense they do not Constitutionally exist, so items about taxation levels, economic incentives, all take place without regard to regional differences, or regions being able to manipulate or to have instruments to manipulate to their own advantage.

Decisions about where businesses should locate other than on grounds of perhaps efficiency of the local authority in their areas, and that a particular business wanting to relocate say from Edinburgh to London, did so on grounds 10 that London was, perhaps it wanted to be closer to the banks, to, you know, to the premier of financial institutions in the UK and that London's boroughs were more efficient in the delivery of municipal services, say than those in Edinburgh. There would be no complex decisions about what benefits we get from not paying this and this tax and offering this and this incentive.

So in the unitary state, people and companies are treated equally in terms of (a) the tax they have to pay and (b) in 20 terms of the benefits they receive from a unitary state. Ja, I think that is it.

**CONSTITUTIONAL ASSEMBLY**

CHAIRPERSON:

Okay, you take questions. Peter?

MR SMITH:

Just an observation, I mean perhaps in general terms much of that is true but if one takes South Africa which was a unitary state until recently, the allocation of resources was anything but uniform. So I mean is it necessarily the case that in a unitary state one is going to have that equal allocation that Richard suggests? I mean are there other examples of unitary states of unitary states where the allocation is horribly skewed within the regions of the sub- 10 units?

MR HUMPHRIES:

On the South African example, I mean I agree but the old South African example is just so complex that, and there were a whole host of, I would not want to call them mitigating factors, but I am not quite sure what the word would be but there were a whole series of explanatory variables which we use but that should not hold and I would not want to characterise the old South Africa as a conventional unitary state. It was pretty perverse in some 20 ways and pretty standard in the other ways.

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

Sure one finds one, you know one could find in any unitary state there are some decisions of public finance did pay, were influenced in some respect by political criteria. I mean a thing like the siting of a nuclear plant for example which is different to the provision of schools across the entire country.

I mean clearly one cannot have a nuclear plant in every town for example. You know, you would have one or two in the entire country so decisions about where to site them 10 or where to site an oil from coal thing, are subject, those sort of issues could be subject to more overt political pressure, but as a general rule on the provision of ordinary services, it should not be able to apply.

**CHAIRPERSON:**

It is Solly and then Francois.

**MR MANIE:**

Chairperson, I think as was stated before when this was initially discussed in the Theme Committee, the test of whether the unitary system or the federal system or what, is 20 really how the financial and fiscal arrangements will work in practice and that is, in fact, the big test because it is

**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

pointless talking about the autonomy of any particular area if that area is not autonomous to finance whatever programmes it wants to develop and how it wants to deal with the tasks that it has set for itself, and to me, the fact that we have the disparities and the diversity.

I mean people make that starting point that the country is very diverse in the way that the resources are distributed, both the natural, human and other resources, but yet in the way that they want to deal with solving those diversities and imbalances, they want to say that we need to in fact, ensure 10 that people have the maximum amount of autonomy in the various provinces.

Now there is a number of things that goes against that. For example the question of industry, the whole question of what is already developing now is competitiveness between provinces vying for the same limited resources. How do we deal with that and how do we ensure for example and with all respect to my comrades from Gauteng, how do we ensure that all the resources do not just land up there 20 anyway. (Inaudible) ... considered as a very serious consideration where it will not perpetuate the already

**CONSTITUTIONAL ASSEMBLY**

marked skew distribution of resources, where industries will relocate because a poor province, a poor province wants to for example attract investment to its area, now through added tax concessions now attracts people to that area and then the cost of relocating industry.

There is also the question of how that impacts on labour relations, how that impacts on developing a uniform macro-economic proposal and programme for the country as a whole, if the regions are able to develop their own economic approaches. 10

It would be quite important to hear how the people who are advocating the federal listing, how they are going to come up with a response to some of those problems.

**CHAIRPERSON:** Does somebody want to respond to the challenge that Solly poses?

**UNKNOWN:** In a federal system it is quite normal that you have 20 competition between provinces and cities. It is a very healthy development but at the same time, the gentleman is

THEME COMMITTEE 3

8 FEBRUARY 1995

quite right, that finance is actually going to decide what functions, or element of functions are going to be implemented by the different provinces, and that depends to a large extent, at the moment, on the Financial and Fiscus Commission, but I am worried that if you look at the Financial and Fiscus Commission, they concentrate on the revenue side.

I believe that you cannot look at the revenue side, not before you are looking at the needs because your back side, 10 you can only come to your problem, you have a totally different situation when you come to the East Cape, where in the Gauteng the needs are maybe totally different.

So there you have to develop the revenue side to kind of, when in a more equitable situation but in this process you must not take away any competition between provinces so I draw a line between a competitive situation between provinces and at the same time a question of equalisation when it comes to basic needs and the revenue side. 20

Now I want to come to the Financial and Fiscus

CONSTITUTIONAL ASSEMBLY

WORKSHOP:



THEME COMMITTEE 3

8 FEBRUARY 1995

Commission, as I mentioned already, at present it seems that they are going to spend more of their time on the income side and I cannot see that they can do it without spending time on the needs of the different provinces.

Then I have another problem with the Financial and Fiscus Commission. If I look at India, and I think Pakistan, and there is now a province starting up in Australia, that you have a body totally outside of politics and there I differ from Breytenbach that to some extent you have to internalise 10 their decisions, but now it is totally separate.

A person does not, okay you have now that the provinces nominate people on the Financial and Fiscal Commission but they are actually not representing the provinces and now the Financial and Fiscal Commission is going to report now to tertiary or find the Department of Finance again totally out of the hands of the provinces and that is where I would like Mr Breytenbach to come in on this.

20

We come later on to the senate and we look for a role for the senate in our type of system. They cannot even

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

internalise recommendations of the Financial and Fiscal Commission by having a senate committee, maybe also of members of the provinces to work on their recommendations. I actually want to discuss it when we come to the senate.

So I just want to conclude (inaudible) ... was quite right when we look at the finance that we must look at some fiscal equalisation. We must look at the question of grants, general, specific, matching, non-matching, it is a whole lot 10 of it, but we must not take away some of the autonomy of the provinces to compete.

**CHAIRPERSON:** Francois you wanted to come in here.

**PROF VENTER:** Thank you Chairman. Most of the points I wanted to raise have in the meantime been raised. I just ...

**CHAIRPERSON:** We have got very little time, please if you could be brief, with due respect, ja. 20

**PROF VENTER:** Okay I just wanted to emphasise the underlying theory

**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

which is being applied in the present Constitution and also in the Constitution of Principles regarding this matter. Since we have nine provinces at this stage who cannot compete on an equal basis regarding revenue, the idea is to have a formula, a very firm formula prescribed by the Constitution according to which the allocation should be made at national level and, to look after the proper implementation of that formula we have the Financial and Fiscal Commission, but it is absolutely crucial that Financial and Fiscal Commission should have strong provincial 10 representation in order to see to it that next year the members of the commission would look over each other's shoulders to see if the expenditure of the previous year, in a specific province, was appropriate in order to balance the thing in that manner.

If that cannot be done successfully, the whole question of national distribution of finance will undermine the idea of financial autonomy.

**CHAIRPERSON:** Praveen, very quickly.

20

**PRAVEEN:** I agree with Professor Venter, that was the thinking

**CONSTITUTIONAL ASSEMBLY**

THEME COMMITTEE 3

8 FEBRUARY 1995

underlying the way the Financial and Fiscal Commission here was done but I think that the point Doctor Marais raises is an important one that we must debate for the future, and that is should there be political involvement in the first instance or in the second instance. If we use the Australian model as I understand it, there they have three independent commissioners and they have fairly well developed infrastructure with objective criteria, data back-up which decides how the fiscus is to be distributed.

10

That commission then produces a report that goes to a premiere's conference where the politicians then haggle on whether any shifts need to be made, which appears to me to be a better route to take than to have so-called provincial representation in the first instance but that is something that we must of course debate.

CHAIRPERSON:

Friends, obviously this issue of finance and fiscal relations and so on in so far as it reflects on models, is something that we have barely begun with and this is something maybe the Core Group can think about setting aside for another workshop. I do not think we can take things any further in

20

CONSTITUTIONAL ASSEMBLY

that respect.

It is now 3 o' clock. We agreed that if need be we will spill slightly over four if we have to but we thought that it might be useful very quickly for the panellists to simply explain: devolution, derogation, agency and delegation. Four concepts, there will be no discussion I fear but just to explain very briefly what it is and then we bring this session to an end. So shall we start with agency and delegation.

10

**PROF BREYTENBACH:** Right, agency and delegation are linked to the model that Richard spoke about this morning, my left-hand side which is the unitary model. Under unitary model the system as far as inter-governmental, inter-layer, inter-tier relations are concerned is one of agency and delegation, meaning that the lower tiers, which they may be lower tiers also in a unitary dispensation,

Is that they exercise their powers on the discretion of the higher authority so they do have the permission to do so, 20 but like it is with all permissions, permissions can be withdrawn. Therefore it can be aggregated. They have the

THEME COMMITTEE 3

8 FEBRUARY 1995

right to do so. It is an administrative discretion and in that sense lower authorities are often used as the executive agencies on behalf of the central government.

Pietersburg all the years was the regional agency for Pretoria as far as the Northern Transvaal is concerned. Pietersburg itself had no powers like Lebowa (inaudible) ... and the other places. Just to show you that Pretoria could give Pietersburg powers and it could take it away, it was fully within its own right and in that case they acted as an 10 agent on behalf of central government so they delegated powers to them and delegated powers can be removed immediately.

Therefore federalists do not like agency and delegation, whereas on the other hand what federalists do prefer, they prefer devolution and decentralisation which are based on the concepts of autonomy which includes as the bottom line, I mean the bottommost line of federal autonomy is the one that we discussed for the last ten minutes, the whole issue 20 of financial and fiscal autonomy.

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

8 FEBRUARY 1995

If a lower level does not have its own financial and fiscal autonomy, then it exists at the discretion of the higher authorities and it has actually only been a permission to exist and not a fundamental right. So federalist and confederalist would argue very strongly for devolution of power which simply means that it cannot be taken away by political authorities. It is written into the Constitution and if the Constitution is the supreme document as in all federations, a central government may not remove some of the powers that have already been devolved. As in usually 10 entrenched if one talks about what is the utmost form of devolved powers then one talks of entrenched powers, for the lower levels.

In a unitary system it is an inconsistency, it is a contradiction in terms to have entrenched powers at a lower level in a unitary system, then it would not be unitary system, then it would be (inaudible) ... federal of sorts, but where entrenched powers do exist on second or third tiers, allowed by the Constitution and not just permission by the 20 politician then it is indeed one that is based on the assumptions of devolution and autonomy and to be quite

CONSTITUTIONAL ASSEMBLY

WORKSHOP:

frank I am not quite sure what the word derogation means.

It is the first time that I have come across it.

**MR HUMPHRIES:**

Nor do I but just to add one thing to Willie's explanation of agency functions or what is agency. A central government in a unitary state can also extend its powers not simply to another tier of government i.e. local powers but it can also create a specific corporation or whatever, to run a specific function or sector. So an airways corporation or a nuclear power agency can be created by the central government to 10 run that as they can also in a federal state.

**CHAIRPERSON:**

Okay just before I come out of the chair, do people want a three minute break or do we continue? I think there are a lot of nods. Okay, three to five minute break, so at ten past we come back. Please do not disappear and then we end promptly at four, is what I gather. Thank you.

**ADJOURN FOR TEA**

20

**ON RESUMPTION:**

**CHAIRPERSON:**

Bringing now the concepts and the models together and that

**CONSTITUTIONAL ASSEMBLY**



THEME COMMITTEE 3

8 FEBRUARY 1995

should take us to around about 25 to 4 and that will give us another 25 minutes in which we will allow for questions which you may have, that you would like to direct at them.

We will allow for five to seven minutes in which those questions can actually be put to the panel, let us call them a panel, and they will take it in and they will decide between the two of them which question will be answered or by whichever person, and then they will answer all of the 10 questions all at the same time, just to be able to give as many people as possible an opportunity to ask a question and to receive an answer to that. I hope that that will meet with your approval. Then I am not quite sure which of the two gentlemen would like to, okay, Professor Breytenbach will start off.

**PROF BREYTENBACH:** The question was put, a couple of minutes ago, by Patricia de Lille I think it was, to the Inkatha representative here, Mrs Smith, on "but what do you federalists want to be 20 added to the shopping list of 29 items." I know what I would have wanted to add to the shopping list if I were here

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

8 FEBRUARY 1995

arguing the case for federalism, is that I would have added something in the context of federal and fiscal powers to the 29 items.

That is what I would have answered because if I look at this shopping list of 29 items which is Schedule 6 of the Constitution, it is all alphabetical, beginning with agriculture and ending with markets and pounds, provincial sport recreation and soil conservation. These things are consistent with the body of the Constitution per se but there has been 10 a very important amendment to the Constitution made early in 1994 and that was the amendment of Section 155 of the Constitution entitled, well the chapter is Provincial Finance and Fiscal Powers.

So here as a result of the, particularly Inkhata's and the National Party's deliberations at the time the Constitution was amended, so the body of the Constitution, Section 155 was amended but not the provincial list except that the 21 items then being extended by six items, six or seven I cannot 20 remember, to soil conservation which was 29 but the terribly important new thing, which is Autonomy on Fiscal and

CONSTITUTIONAL ASSEMBLY

WORKSHOP:

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

Financial Affairs, was in fact not reflected in this list of 29 powers and it would have made it much easier for a Constitution analyst like myself and many other people to finally decide where to place this Constitution. Is it more or less federal or is it more or less unitary?

If this shopping list had contained also something referring to this which is consistent with Section 155 Financial and Fiscal Powers, then it would have made it easier for me to give a judgment either this way or that way. Now the topic 10 for this afternoon is Relations Between the Models and the Concepts. Again I refer you broadly to my models this morning, the scaling of this model from unitary on the left-hand side to confederalism on the right-hand side. What I also did in my preparations was to do this, and you have got it, that one over there, let me - so I think that if I had to prepare a check-list for a typical federation or a federalist model elsewhere, then I would have looked at all the concepts that we discussed this morning.

20

And I added some of my own, and that is my check-list.

**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

Also not necessarily in ranking order from most important to least important, but to some extent when it comes up to this point there, these are all bottom-line principles. These are all bottom-line principles that I am not aware of. There are many Constitutions in the world whether it being developing nations' Constitutions such as India and Brazil or established federations such as in Canada, United States and Germany but I think up till there, from devolution to asymmetry, this is probably, the first concepts there is what you will find in the Constitutional Law and Political Science 10 handbook describing these political systems, so this is an easy check-list as opposed to what I can find there on the other hand side versus this, this is what I think is contrasting with this list, and what you would find in the contrasting system, and if the contrasting system here is non confederalism, the contrasting system here is unitarianism.

So this is what one would find as I just explained a short while ago, that delegation and agency would be found under 20 unitary systems whereas these are the typical low groups. These are the true concepts that one would find under

**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

federalism but as I also said this morning in my opening remarks, is that there is no such a thing as a true federation in the world. There is no such a thing as a true unitary system. There are overlaps all over. That is the reason one can actually grade one's system from unitary to confederal and it is overlapping all the time.

It is either a little bit here, a little bit there and in that sense one should not be too dogmatic. There are perhaps some unitarianist aspects in the typical federal system but also the 10 other way around.

The bottom line of a federal model is a three tier system. I am not aware of any of the roughly 40 to 60 federations in the world today, I am not aware of any one that operates on a two tier basis so the federations that I am aware of, whether that be first world or third world, would be three tier systems - national, regional and local.

Under a typical federal dispensation these two levels, the 20 last two, regional and local, would be relevantly longer versus the national level that with under a typical

**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

decentralised federation such as Germany and United States, being a very short level, thin as it were because under those circumstances the powers that the national level can exercise are in fact listed and if anything is listed it is limited.

In our case we do not fall in the blue blood category as we stand now with the Interim Constitution because what we do have listed is the 29 items listed under Schedule 6 which is quite a long list of items but the principles, but the case in 10 principle is not whether a list of 29 is long enough. The principle at stake is that in fact it has been the central level that has been limited through being listed and all the rest, all the rest ends up as a residual power with the National Government.

Under decentralised federations which I guess is what our strong federalist parties all say this chamber today are in favour of, would be arguing for residual powers to be at the regional level. So you list the national level and all the rest 20 then is being handed over as a means of residual powers to the regions. But as I explained there are federations that

**CONSTITUTIONAL ASSEMBLY**

are just the other way around, Canada is just the other way around.

Nobody denies that Canada is a federation, yet what is happening in the case of Canada is like in our existing Constitution, also listing the regional powers and all the rest then goes up to the higher order. That takes care of my point number one, devolution. That takes care of my point number two, autonomy for the lower levels. That takes care of subsidiarity which we did discuss this morning. 10  
Subsidiarity means as again as we said, is that the lower level ought to exercise powers in principle and only if it cannot do so as a result of efficiency, effectiveness and capacity that it then goes to the higher level. In church it is "die gemeente" right down on the ground but in Constitutional law as I said, it usually begins from the regional upwards. That is how the subsidiarity principle in practice works. I am not sure that it is necessarily so in theory.

20

The next point to my mind, if we had clarity over that then that would solve a lot of the other debates about concurrent

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

powers, about exclusive powers, about prevailing powers, these are all border-line powers, what is prevailing or overriding. What is concurrent and what is exclusive, these are tough cases. We almost need to have adjudication to decide on that.

An easy test, things are not always easy but an easy way out of this dilemma, to simply to have clarity on that, to have clarity on where would you like to have your listed powers, you do not list both, I am not aware of any model 10  
Constitution that lists both.

You either list this one or that one so as to have the bias in terms of you wanted to bias it through towards the national level if you want to have, be the national level stronger you list the regional level. If you want to have the regional level stronger then you do what the Americans and the Germans have been doing, then one lists the national level so one does not do both. You go for either or, and in terms of making things easier in future, avoiding costly, unnecessary 20  
time consuming litigation in the Constitutional Court, you people who are responsible for the writing of the

**CONSTITUTIONAL ASSEMBLY**



THEME COMMITTEE 3

8 FEBRUARY 1995

Constitution, get clarity on that principle and I guess this is the third law and order. You are going to fight over that in future because this is the crux of the issue.

Then after that has been solved then one would find that concurrent and overriding and exclusive becomes a matter of interpretation. Now we are struggling with one another because concurrent is not an ideal thing. It does require framework legislation. Framework legislation does require clarity on residual and exclusive. The only things that we 10 know that are exclusive are those things that are listed, but in our Constitution right now we have a little bit of "deurmekaar spul" there because as far as the Central Government is concerned there are a lot of issues that we think are exclusive to Central Government, yet the Constitution lists only three.

It lists only Finance Section 60, it lists only Foreign Affairs Principle 21 and it lists National Economic Policy also Principle 21 (v) at the end there in Schedule 4. For the rest 20 it is all residual yet many Constitutional lawyers who try interpret our Constitution actually say that all these other

CONSTITUTIONAL ASSEMBLY

WORKSHOP:

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

powers are exclusive to the Central Government which they in fact are, but it is ambiguous. It is not clear. It is open to interpretation and it would be nicer for all of us if you people in this constituent assembly could get clarity on that so as to avoid the trappings of these three levels there, that is, concurrent, overriding and exclusive, because they can lead jointly and together lead to unnecessary and costly litigation in future and then obviously this is the bottom line of federations, namely the supremacy of the Constitution versus the supremacy of Parliament.

10

Here Parliament can decide whether it wants to change the Constitution whereas where the Constitution is supreme, Parliament cannot decide. There are other mechanisms, that is the reason why this is so and usually when the Constitution is supreme, the Constitution is also rigid. A rigid Constitution is one that cannot be amended easily. It is either by means of a referendum, weighted majority, above the people's heads or if there are two chambers as it now is, weighted majority say it is 66% in both chambers or 20 by (inaudible) ... in a joint session say 75% plus still ratification by the Constitutional Court plus a referendum

**CONSTITUTIONAL ASSEMBLY**

out there. So there are various mechanisms available that one could build into it.

In our Constitution as it stands now is fairly rigid but it is not as rigid as many other Constitutions. Not that it matters that much because this Constitution will cease to exist within the next five years. There is this very interesting academic point.

When will the Interim Constitution cease to exist? Will it 10  
cease to exist in April 1999 after our next mother of all elections, in four years' time from now, five years from last year, or is this Interim Constitution that is the subject of our debate this morning, and is that Constitution going to cease to exist once you people have completed your work which is supposed to be within a year from now.

I quote Judge Pierre Olivier who has written an authority piece on that, he says "this Interim Constitution will cease to exist by next year 1996 once the new Constitution has 20  
been adopted in the Constituent Assembly, being accepted by Parliament and certified by the Constitutional Court.

The Constitutional Court is not going to wait until 1999.

The Constitutional Court should it have your document ready will have certified that before Christmas next year and from then onwards or for this existing Constitution will then cease to exist. So this Interim Constitution of ours, unlike what we thought that it is a Constitution for five years, it is actually only a Constitution for last year and for this year then it will be over and done with. That is the reason why one should perhaps focus one's entire energy on the work 10 that you are doing because there is no promise implicit in the Constitutional Principles that we are going to have another Constituent Assembly in another five years' time.

The Constitution that you are going to produce is going to be with us for a very, very long time, unless the writers of the Constitution, you people, providing you have written into the Constitution the guiding line for the Constitutional Court namely that in five years' time or in ten years' time, it can again be amended as in the case of Zimbabwe it was 20 after five years. After ten years the whole question of the (inaudible) ... the House of Agreement or the White Special

THEME COMMITTEE 3

8 FEBRUARY 1995

Representative and also the land clauses and so on so you do have the authority to do so should you wish to do so but it will be nice for certainty, for confidence in which direction this country is going if one could have one's ultimate rule in this new Constitution as final as possible without building the uncertainty that in five years' time we shall be, in ten years' time we shall be doing the same exercise over again.

Then asymmetry as I said I am not aware of any, or that 10  
there are not many Constitutions in the world that are explicitly symmetrical with all the provinces, all the components such as the "Länder" of the provinces are exactly equally strong. The dominant position under federations is that we have asymmetrical. The best examples being Canada with Quebec as much more powerful than the rest of Canada and Italy where the north and the south have got much more powers than the central part of Italy and it also differs in the case of Belgium for instance where the Flemish, the Walloons and the Brussels 20  
components of their federation have different levels of powers and from that level onwards.

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

From this, from my shopping list here downwards, that has not got to do with principles per se but things that could and would and should make the system of governors better. One of the major weaknesses in this interim document is that it is very weak on describing how they have reached institutions created by the Constitution are in fact going to work. In fact it created these institutions, they almost hang here, there is very little inter-linkage. We all know that senate for instance, represents the virtual input yet the Constitution does not instruct how the provinces and the senate ought to inter-link and in what way. 10

The clearest that we have got here, the strongest point in terms of how the system is going to work, is contained in the Constitution on the provision as far as the Financial and Fiscal Commission is concerned. This is an important cog in the wheel of making a system work but as we have, the driving line in the Constitution for the Financial and Fiscal Commission one could extend that model also to some of the other institutions in simply describing how they must inter-link. Right now they hang in the air but they do not really inter-link and that is the big weakness in our 20

**CONSTITUTIONAL ASSEMBLY**

**WORKSHOP:**

Constitution.

Then obviously all federalists feel very strong about the senates. All federations that I know of have senates. It does not mean that senates are exclusive in federations because there are also unitary systems that have senates. Britain and France for instance. They are unitary systems (inaudible) ... both (inaudible) ... and upper houses because they do not call it senates, and then this is terribly important - Financial and Fiscal Powers, the so-called equalisation. It 10 has got to do with inter-level financing from the centre to the provinces and to the municipalities and if the federalists ask me, and I repeat what I said to the question of Patricia de Lille, "what would you federalists like to add to the powers?"

I would say add fiscal and financial power to your shopping list which in this instance I would add it there because if I as a federalist know that fiscal and financial powers is added to the list that begins (a) with abattoirs and ends right at 20 shopping list number 29, I would add a 30th one, if financial and fiscal powers have been added there and as a federalist

THEME COMMITTEE 3

8 FEBRUARY 1995

I would feel shucks it is safe, at last my bottom line has been met. Right now my bottom line has not been met. If I were a federalist, my only bottom line that had been met is in fact Section 155 in the Constitution which has been sufficiency, which has been adequately amended last year before the elections. It has been amended but all these amendments are non effects. So if I were a federalist I would say this (inaudible) ...

You are getting me on line by amending 155 by giving 10 financial and fiscal and taxation power to the provinces, yet you are not entrenching them. I could say the same about the senate. The senate functions, such as looking after provincial boundaries, provincial competencies. Boundaries and competencies are entrenched. You cannot comment provincial boundaries without going through a hell of a rigmarole. Two thirds of both sessions of this House of Parliament meet in separate, or in provincial boundaries for instance and that is a cumbersome process.

20

It is an example of how provincial bound for instance but the institution at central level that looks after the provincial

CONSTITUTIONAL ASSEMBLY



interest, is the senate. The senate is not entrenched because the only entrenched things in our Constitution are actually those items that are incorporated in the 34 Principles. If you read the 34 Principles there is not even a sentence that contains the word senate as in whatsoever. So the senate can be abolished by simply adding the two Houses of Parliaments together and then even if all the senators, even the ANC senators, would be added, would be aiding with the National Party in our decisions will also feel strong about senates.

10

All those might-be votes could be ground, could be ground because what is required is simply two thirds, the two thirds and 90 out of 400 is not big enough to offset that so the point is, the senate interest or provincial interest are entrenched but the body that defends it at the end of the day, the senate, that can be abolished even before the new Constitution is written.

But it is highly unlikely because the federalists in the lower 20 house such as Inkhata and the National Party make up almost 33%, 32.6% of the total votes in the senate and that

(inaudible) ... any possibility of having the senate scrapped simply by means of an ordinary majority.

Then lastly, self-determination. Self-determination is not necessarily a federal component. One actually finds that more under consociationism where there is also the possibility of group rights, group protection and minority veto, that kind of thing which is perhaps the debate that the National Party and the "Vryheids Front" would want to introduce with a view to cultural self-determination under "Volkstaat" but per se this is something that is not a federal debate on its own per se. It could be but not necessarily. 10

**CHAIRPERSON:**

Thank you Professor Breytenbach. We went a little bit over our time but I watched the faces and there was nobody looking at me and pointing fingers at me. They seemed to be interested in your input and therefore I decided not to stop you. I hope we were seeing the standing (inaudible)... I am going to ask Mr Humphries to put his case as well. Thank you. 20

**MR HUMPHRIES:**

Thanks doctor King. I want to be very brief simply because

THEME COMMITTEE 3

8 FEBRUARY 1995

the case that I was asked to present in a sense for a unitary state and the concepts that were listed, virtually 90% of those concepts have come out of the federal side and Willie has gone through that so I do not want to touch that. However I just want to make brief remarks about Constitution making in general, whether one is a federalist or a unitarianist or a regionalist, and that is I think there has been a feeling today, that I picked up today at least, that most or all participants are trying to design, have at the back of their mind an assumption that they are able to or 10 want to design the perfect Constitution for South Africa.

I just do not think that is possible. No Constitutions are perfect - perfect in the sense that they either prevent political conflict or they channel it in acceptable ways, although some do that better than others, but if political conflict remains, whether we have a reasonably good Constitution or not, I mean in a sense whatever model one actually opts for, opting for a model has a whole set of trade offs. 20

The unitary state has to trade off the ease, the quick decision making which having one single centre and a strong

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

central government brings, against losing out on some of the sensitivities of regional differences and regional variations. That is just one. On the federal side, a federal model is generally a very complex model and that in turn has some trade offs which, you know, could be said not to be good, but both models, or both models and their nuances and their continuum, all Constitutions are along that continuum, all involve trade offs.

Some points are better than others. In a sense I think each party represented in the Constitutional Assembly ultimately has to accept that they are designing a Constitution which at the end of the day, whenever that day might be, the next election or an election, you know, three elections down the road or whatever, or elections in regions down the road, that each party might have to accept that it has to live with Constitutions which give them, or rather that political conflict and political results in voting in 1999 or 2004 in the centre or in the northwest or whatever, that each party might find itself in the position where in an electoral position which it did not expect to be in when it was designing the Constitution.

**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

So in a sense I suppose I am saying that political parties have to somewhere at the back of their mind also design the second best Constitution for themselves. But let me stop there and you can have, pick it up.

**CHAIRPERSON:**

Thank you Mr Humphries. Fine, what we will do now, and you will have to help me with your names please, I am not quite as good as some of the other Chairmen up until now, but can we just ask you to announce your name so that the two gentlemen here also would know who to refer to and then ask your question please. Doctor Marais? 10

**DR MAREE:**

There are two aspects we, I will not say we neglect it, but I think we could give more attention to it, the inter-governmental co-operation and the senate. When we talk about inter-governmental collaboration we can also talk about in intra. I think it is more intra than inter. The role of provinces in the decision making of Parliament. For example in the American system they cannot change the Constitution if they do not get 75% of the votes of the states. 20

**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

Now what role, a person, the senate representing the provinces, you have that to some extent when you have a change of borders but that is about all. When you come, that is the reason why I link it to the senate, that it was also mentioned to you right at the beginning that to some extent the role of the senate is neglected in the Constitution. I think he mentioned it again in your, a few minutes ago.

Now if you look at the role of the senate. Let us take the Americans. You find that they play an important role in the 10 foreign affairs committee. Otherwise they are linked to the house, but there is a weakness in regard to the financial side and I think we have mentioned before, the fiscal role, but also the problem of the correlation between provinces or states. In Canada you have the, what we call executive federalism, where I think it was mentioned here, where you have the premieres all meeting and we have to some extent the same.

If you take the American you have the, it is interesting when 20 you take the inter-state, commerce and more, it is mentioned here by Doctor Davis, the Supreme Court said

**CONSTITUTIONAL ASSEMBLY**

THEME COMMITTEE 3

8 FEBRUARY 1995

"we are not in a position to implement it, it must go back to the house" so there is a (in Afrikaans "daar is 'n leemte") Nobody knows what to do with this problem of inter-state commerce.

When you come to regulation, the White House, the President had to step in because the house by accepting laws not considering the effect of regulating or implementing the laws in the case of the states. It cost (inaudible) ... it cost a hell of a lot of money, so there is a weakness and I am 10 going to ask you can't we consider the possibility of giving the senate a more important role in regard to correlation between provinces, inter-state commerce, regulation, finance and also a role of protecting, to some extent, the rights of the provinces.

CHAIRPERSON:

Thank you. Can we have someone from this side perhaps now and if we can make it a little bit shorter so that we can get more opportunities. Mr (inaudible) ... ?

20

UNKNOWN:

Chairperson I just wanted to ask, there was this thing about, the Professor said that if he was a federalist, by now I think

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

there is no doubt in my mind whether he is or is not, but he was asking what should be added to the list of things that is already listed. Now in my view it is not good enough to make a general statement about the thing about adding financial and fiscal powers to have that actually listed but to show what powers.

I mean when we are talking for example the taxation powers, what taxes do you actually think should be raised at provincial level because it has major implications because 10 often we speak very glibly about devolving power to the provincial level when it comes to taxes but if we do not specify what those taxes are, like are we talking about the company taxes, income tax, VAT and whatever other taxes, or are we saying other taxes? Because those things ultimately become the determining factor of how it impacts on our economy and whether it ultimately then perpetuates the regional disparities that exist now, especially the rich and the poor regions. So I would like, not necessarily from the Professor, but perhaps from some of the people who 20 also agree with that actual taxes ...

**CONSTITUTIONAL ASSEMBLY**



CHAIRPERSON:

(Inaudible) ... and then Professor Venter, because they have also directed some of these questions to you Professor Venter and let us just see where we get time-wise. We are crawling on to ten to, if we, whether we can allow for more than that.

UNKNOWN:

Ja, mine carries on, on the fiscal, and when could we see what the models are of getting, you get equalisation and then does the amounts from the equalisation come in one globular amount or by budgets, in other words does, is it 10 earmarked for education, this, that the other, or what sort of flexibility can you allow? In other words does framework legislation determine how you can budget that globular amount at the province or do you budget it in lines from the centre?

UNKNOWN:

Madam Chair, I think addressed to Professor Breytenbach, he mentioned this morning, federalism state, or a federalist state more or less always has one Constitution, single Constitution state, but in our Interim Constitution if we 20 accept this here Article 160 says that provinces can also grant their own Constitutions. Now if for example provinces

draft their own Constitutions exclusively say 40%, 60% concurrent, do we still talk of a federal state's single Constitution-wise or this now more to a (inaudible) ... type or where do you fit this kind of model in?

CHAIRPERSON:

Can we first get Professor Venter, or do you want Professor Breytenbach to answer that?

UNKNOWN:

Chair, I am going to address something completely different. Perhaps he would like to answer that question first. As you 10 wish. The matter I wanted to address Madam Chair, was what Professor Breytenbach called the Third World War.

Perhaps one should attempt to avoid the Third World War over residual powers by looking at the meaning of the term from another perspective. Residual powers is something which really comes up in the process of federation. Federation really is the result of, if a number of independent states all from the point of completely separate sovereignties then they join together into a federation and 20 they jointly decide which of their powers they will transfer to the new federal structure and in those circumstances what

remains, which is not specifically listed, could be referred to as residual powers.

In our circumstances where we do not have a federating process, we did not have one and we will not have one, we started off from a unitary state establishing new provinces. The provinces obtaining through the Constitution original Constitutional functions and powers. Residuality can be avoided. As a matter of fact in the present dispensation it is avoided.

10

Residuality is non-existent in the present Constitution and I would suggest that one should at all cost, in order to prevent the Third World War over this, not think in terms of residuality. Thank you.

**CHAIRPERSON:**

Let me just see. Mr Smith just to be fair, I will give you an opportunity quickly too and then we will get Professor Breytenbach to reply. I see Ms de Lille also wants an opportunity, if we can have two very quick ones otherwise we are running out of time.

20

MR SMITH:

In the composition of senate, comparatively speaking one can, the senate can represent the people of a province, he could represent certain legislature or it could be as in the Germans, agents of the executive. Can you give your views on the advantages of selecting a senate on the basis of these options?

MS DE LILLE:

Madam Chairperson mine is not a question but a correction on the Constitutional options as presented by Professor Breytenbach here, where he has got the PAC here and says 10 the Black state and then unitary. The PAC is always for a sovereign single state and a single nation. I will request that to be corrected please.

PROF BREYTENBACH: I take your point. What labels do to one.

CHAIRPERSON:

Yes I am sorry. Professor, whichever oh, all right the last question.

UNKNOWN:

Quickly come to, in response to Francois, you know he says 20 we should avoid this that (inaudible) ... residual powers, but is it not possible to avoid residual powers, you know, I do

8 FEBRUARY 1995

not know whether he can respond to that because I mean if a power is not listed, presumably it is residual and not every power can be listed in the Constitution as the way I understand it. I just need a response to that.

UNKNOWN:

Very briefly Madame Chair, the present Constitution does not deal with residual powers. There are no residual powers. There are areas where the provincial governments can operate. If they do they occupy those areas and until they do so the powers vest with the National Government 10 and the residuality does not come into the picture at all.

CHAIRPERSON:

Mr Humphries actually also wanted to add something.

MR HUMPHRIES:

But Francois, I mean by implication doesn't the present system in, confirms that you by implication confirms that your power is in the centre, to the extent that a function like water affairs or forestry, and these functions that are not specifically listed as provincial functions.

20

I mean we are doing a project now on small business promotion and inter-governmental relations and small

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

business is not listed specifically as a provincial function yet all the provinces have got small business desks and they are going on and on and on about it.

It is not specifically listed. It could be argued that it is theirs because it is a component part of trade and industry but I mean on functions that are not specifically listed as provincial, the implication is that those are central government powers. So by implication we have a system which confers residual powers in the centre and not in the 10 provinces.

**UNKNOWN:**

My point is that is not completely the correct definition of residual powers. The correct approach would be the one I tried to describe, regarding for example the United States, but if you want to speak of residuality you must have in mind something remaining of something else, and that is not in the picture at the moment.

**CHAIRPERSON:**

Fine, can we just, those questions that have been asked and 20 that may be outstanding please.

**CONSTITUTIONAL ASSEMBLY**

**PROF BREYTENBACH:** Okay the first point was raised about the senate, or the first problem obviously was the senate in the Constitution is that the senate is not entrenched. If one believes in that, one believes in provincial interest then one could argue what is the best way to protect provincial interests and world-wide this is usually that kind of special interest, except in England, where the upper houses for the House of Lords or the English aristocracy.

But in all other countries in the world that do have special regional type of interest, these are usually represented in upper houses and this is where our upper house, the senate comes in within the weakness, the floor of this whole construct, namely that the interests of provinces are entrenched but not the body that supposed to protect those interests, which is the senate which I think is therefore an oversight in the final make up of our Interim Constitution. 10

Then the second question, somebody else asked a question, how best to represent provincial interest in the senate. 20 There are various models available but the usual one is, or there are two varieties. Either they are directly represented,

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

senators in America are directly elected from bottom upwards just like members of Parliament are elected. They have these overlapping elections in America so there they are directly elected or if they are not directly elected then they are indirectly selected by means of those elected members of the provincial legislature, and this is as far as mainline democratic theory goes.

Either you go for bottom upwards direct election or indirect selection through the legislatures in the provinces that then 10  
act as the electoral colleges. Then one can still introduce other mechanisms such as whether it should be first past the post, whether it should be on the basis of proportionality as we have now, that these things are detail and not principle that can be discussed.

The kind of, the second question was what kind of taxes could be made available for provinces? I would not argue that provinces ought to levy company tax and indirect tax. Also not argue that they levy their own VAT. So these are 20  
the three major forms of taxation but in the forms of licensing, in the forms of horse-racing, in the forms of motor

**CONSTITUTIONAL ASSEMBLY**



car registration, in the form of provincial hospital fees, in the form of nature conservation, these trails that one goes on walking, all these monies, mainly horse-racing, motor licensing etcetera.

These should, if collected within a province, should become the financial and the fiscal base of that province to be capped up by a certain proportion of state collected money, which clearly the state collects from the citizens in all the provinces concerned, then to be made up in a formula and 10 that is the task for Murphy Marobe and his Financial and Fiscal Commission to come up with a formula that serves also as equalisation. Equalisation is not direct proportion so a poor region will not get its direct contribution to the fiscal in terms of its own pooling.

Equalisation precisely means top-up, cap-up, so that if the poorer regions get a compensation from other regions by means of an agreed formula, must be transparent, by means of an agreed formula, almost a kind of principle that 20 obtained to the old original services councils where one component of a regional services council made monies

available for the less developed components of that regional service council. That is a case of equalisation and not direct proportion. So this is how I would argue that one.

Then the question over there about the right that has been written into this Constitution, the Interim Constitution at each of the nine provinces, do have the right to write their own Constitution. That principle was not just a concession to federalism because there are not many federations elsewhere in the world where the constituent states have 10 their own Constitutions per se. In the case of America yes but this bends over towards even to the right-hand side of federalism, namely to confederalism where the Constituting entities in confederalism are sovereign entities.

What we talk about here now is something substantially less than sovereign, some or other degree of autonomous and it is not always that autonomous entities have their own Constitutions, and since this concession has been built into our Constitution, it is a concession towards a large degree 20 of autonomy but it is not inconsistent, at least with decentralised federations as in the case of America where

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

each of the 50 states have their own little Constitutions under which they also have their own senates because many states in America have not only a lower house, but there are states, but not every state in America also has an upper house, so America actually has the major senate in Washington plus in many of the 50 states are also senates so there may be 30 separate senates in America in addition to exactly 51 legislatures, because the essential one in Washington has a legislature and then each and every state in America also has an elected legislature.

10

So to answer your question, it is a concession towards confederalism but not inconsistent with decentralised federation as in America that is not a confederation where each and every of the 50 constituent states also have their own Constitutions. But in that case they then deal with those matters that are residual (Francois Venter's argument) that are residual to the states in America, our provinces in terms of what remains after the central level's powers have been listed and everything that is not listed by definition can be handed over to the provinces.

20

**CONSTITUTIONAL ASSEMBLY**

THEME COMMITTEE 3

8 FEBRUARY 1995

The American which our states and then I found Francois' intervention, his statement that we do not have residual powers in our Constitution, I found it strange, I must admit I have never heard it before. I would like to see an article by yourself as somebody that explains that because as I understood the Constitution, there are clear residual powers and that they are vested in the central government simply because they are in addition to the other 29 items.

I know you are a very learned person, I have high respect so 10  
that is the reason why I would love to see your footnotes, especially how you come to that conclusion but I stand by my original assessment which was also Richard's assessment, that I thought very strongly so, that we do have residual powers and in fact that residual powers actually vest with the central government. But I shall go to your superior knowledge on this particular point but I am fascinated by it. I have never heard it before.

CHAIRPERSON:

Ladies and gentlemen, can I just find our Mr Humphries 20  
anything that you would like to add?

CONSTITUTIONAL ASSEMBLY

MR HUMPHRIES:

I just find that I do not, I think Francois is right, we do not have residual powers specifically listed. I think by implication we do but it seems to me that the one, I have reading an article recently which was in one of your submissions, in one of these pink volumes, which makes the claim that, the author makes the claim first we have exclusive powers in the Constitution and then two paragraphs later he dilutes it to qualified exclusive powers, and the confusion comes and I think it came through in Willie's presentation too, when concurrent was taken out of, 10 in that final Constitutional Amendments before the election then by implication people are saying well if it was not concurrent, it is now exclusive, or some people are.

I think I was putting it too strongly because the overriding principle of concurrency remains in terms of those overrides.

So I think that is where the debate is going to lie and just simply to note from an academic point of view that if Kempton Park and CODESA was about designing a 20 Constitution in a relative vacuum in the sense it was only responding to political pressures out there, redesigning this

THEME COMMITTEE 3

8 FEBRUARY 1995

Constitution is debating principles against the implementation of the Interim Constitution which adds a whole lot of new dynamics.

CHAIRPERSON:

Thank you very much. I think that we have come to the end of our very interesting day. I must say that I cannot tell you that it was a long day, it was an exciting day.

We have all gone through, I think, a learning curve and I would like to say thank you very much to the two gentlemen 10 who have made themselves available to us today and for their tremendous input that they have made here today. I from my side would like to say thank you very much, I certainly have learnt a lot. I think a lot of things have fallen into place for me, especially all these big words that we come across all the time and that people use so glibly. Thank you very much. I think we can all just give them a good clap.

Can I just make a few announcements and I am just asking 20 that the secretariat help me with that. We have our meeting again tomorrow morning at half past eight.

CONSTITUTIONAL ASSEMBLY

WORKSHOP:

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

The Theme Committee Meeting but can I please ask that all of the Core Committee Meeting, rather all of the members of the Core Committee plus the technical assistants, that they will remain behind please.

Can I just ask that the Chairman or that the Core Group members just quickly come here and let us make a decision on tomorrow please and the rest of you just hang on a moment so that we can tell you whether you come tomorrow or not please.

10

[ END ]

**CONSTITUTIONAL ASSEMBLY**

**TRANSCRIBER'S CERTIFICATE**

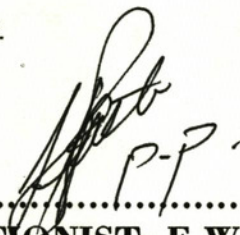
I, the undersigned, hereby certify that in so far as it is audible, the foregoing is a true and correct transcription of the proceedings recorded by means of a mechanical recording of the:

**THE CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 3**

**8 FEBRUARY 1995**

**WORKSHOP:**



P-P.

.....  
**TRANSCRIPTIONIST: E WEBSTER**



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



TC 4 14/02/95

Tape 4

**Respondent:** Mrs Manzini: I understood that we requested to make our comments on the programme and actually even make suggestions of how we as a Theme Committee feel that the cause should be conducted our needs our priorities, so I prepared something here and it's a pity it is not circulated but it's written so I go through it very fast because for me I felt very that it's going to be appropriate for Theme Committee to accept the idea that all like collectively benefit from basic course of the principle underlying the context and practical application of the Bill of Rights, and we are not able to take advantage for courses which are offered in the country for instance there is a course at RAU which actually offers this . when actually I took in the time the course at RAU is about 3 days and some of us quite, if we could go there and register but it coincide within our working parliament it was impossible but the course I think issues which make us familiar with the Bill of Rights and I think it will benefit all members if we were going to start off like that because not<sup>all</sup> of us, just lay people not lawyer etc., and thus I'm suggesting that the approach the Wallenburg institute have taken since it to give us a general idea on some mechanics, stationers, in you etc., but I think we need first to understand the basis so I'm suggesting we have maybe something if we should deal with historical comparative of Bill of Rights, Human Rights which can be actually at the UN machinery and the OAU so I've tried to actually encompass what the first session also deals with here and the second thing.

I'm proposing that we should that something on the process and the implementation because that help us when we think of Rights lay people could say that what is the process on implementation etc., or the very Rights ~~were~~ are talking about and I thought nothing to deal with ~~of~~ it quite a thorny issue and needs ~~and~~ understanding all of us is the interpretation and application of the Bill of Rights in particular I'm thinking of Rights such as <sup>e</sup>quality, religion, culture, Liberty, Freedom, Social-economic Rights and environmental Rights that all of them if they are in the Bill of Rights for instance the implication etc., and of number 4 I'm thinking that should also have something we institution and process for enforcement for the Bill of Rights and we also who have something on basically what the Bill of Rights does also does it protect persons institution etc., and also we have to counting on the protected interest and conduct I think that is very important and it would make us understand the various arguments to be posed throughout the debate when we deal with horizontally and verticality etc., the (7) issue I thought which can be dealt with binding effect on all Governmental organs and other people. (8) Is the limitation clause what one they what do they serve etc. that's all I have.

**Chairperson:** Thank you there are some constructive ideas on the format which possibly would be followed any other comments.

**Mr. Sizane:** I'm going to suggest something on professional I think it would be useful all this law as that the co-group permit to try and process and the suggestion but I think we can open it up, and get even those who have written submissions and some ideas that are thrown but the co-group will seat and process it and bring it back as soon as possible.

**Chairperson:** Thank you that the practical suggestion but I would like the number of views expressed here to the format and even the question who would chair the various stages of this seminar, are you happy with the people have been basically suggested there we have to make a move very shortly because we must secure availability of these people and if not them any ideas on who else.

**Mrs. Mabandla:**

I think that is more useful the contribution with regard to content and the legal fraternity itself. I mean amongst them to no each other when I looked at those chairing here are people knowing really known in society to be Human Rights, Experts persons Advocates, etc., so I wouldn't be wary of seeing us intervening even with the practical arrangements of the conference, I think it's content that we should go of end begin Chairperson. Perhaps to follow up that idea and that of Mrs Manzini that possibly we should take into account the document we should prehand in here now in the core group see it we cannot request the institute and the organiser to ensure the aspects raised by her ideal with party people who that put some substance to those additions. Any other comments?

**Mrs Vos:** As I understand it this is going to be conducted over by several different dates am I right?  
(Chairperson: - Yes, but this particular one of the 4th and 5th March is specifically for Theme Committee 4 and we can adjust the programme to suit ourselves).

**Mrs Vos:** Why I am raising it because my impression was that these couldn't attend on 3 & 4 speaking for the I.F.P. even have a special general conference that weekend, so we will be there then so which unfortunately so miss nothing (Chairperson: apparently so will be later seminars in which you could attend) and then just following up there are couple of points when Mrs Manzini mentioned the human OAU and I would also like to add these a European Declaration lets looked what perhaps bringing Europe as well and lastly is the agenda on the draft and put out here with the greatest respect I think it be inadvisable to have a co-group person what the issues have original Professor Asmal as tell a party political person involved in the agenda which he is involved in our debate I think it would be inappropriate.

**Chairperson:** Any feelings from the ANC side on regard to Professor Kadar Asmal.

**Mrs Manzini:** I don't see any problem here because I think this is not going to be a meeting or we are going to take decisions or people will be representing papers or going to any conference were express our views when we bound to take what they are saying its not a decision making I think Professor Kadar Asmal is known and special in this field hence asked her about International Human Rights Institutions so he will be dealing with that.

**Chairperson:** Any views.

**Response:** I said with respect the questioning Professor Asmal I'm doubtedly in the expertise point. I really point it is one is it appropriate how then are others also that might to say well that the I.F.P. the National Party want a person obviously one can approach philosophy academically logically in terms of one academic emphasis. I mean there are many aspects to any presentation for a person who is also as apparently a political head.

**Chairperson:** Can I have any further views from other parties regarding this aspect. It's just a principle whether members of this Committee should in fact participate in the actual seminar itself as leading guest speakers or leading speakers or whether in respect advisable not to have such persons that also give excess takes us to other aspects as you can see Session 2 is proposed that the convener of one panel in the Experts should chair that particular meeting perhaps one could have comment on that as well.

**Mrs Pandor:** Really, Chairperson, I think we should be coming over prescriptive and abuse the way in which address our matter as I see it the panel of people that are qualified in this area members of the Theme Committee will be present during that panel of session to challenge and engage the debate on the issues that be raised by the various panelist and I think this is all part of academic exercise and we should see it such should get a party political tent then I think we could raise party political debating items at this session so really I think lets be because many of us have are in fact qualified in particular areas and do give papers.

We are now going to be stopped from participating in conferences because membership of this parliament that are really would be very wary of this we do have life beyond parliament so I really challenge this and say this on away it should really be debated further.

**Mrs. Vos:** The totally misspent any question can speak at any platform from which to do so as members of parliament the issue this is in fact similar specifically as I understand for this Theme Committee different.

**Mr. Bacher:** Chairperson, I must say that from my side of view, is supported by Miss Vos in this regard, I think Professor Asmal know politician now it is to present a paper in work. can obviously work set up Theme Committee in that regard we set up the Theme Committee and in that regard with no disrespect what Professor Asmal is now a politician and I think in this regard equipped people otherwise do representing papers in such a workshop and I was strongly in Mrs Vos in this regard.

**Chairperson:** I allow further debate.

**Response:** Chairperson, I actually be wary because we are coming late in the presidency that says in future actives of the same kind, organised by the theme Committee members of the Theme Committee in this because we came play a leading role here with different experience expertise except and it might actually happen in future we want to organise a similar workshop in an area where Miss Vos has raised the same particular expertise because she is the member of this Theme Committee

She must be excluded from that, I think it should be a very dangerous presidency in that relay is it impossible and theme committee benefit from the expertise that someone with the members of the Theme Committee to possess.

**Response:** At last, even if we indeed decide we want to have Professor Asmal then the National Party should be free to but forward a person academically that the I.F.P., A.C.D.P. the D.P. then if that is the principle we all accept and all then must find the academic to be in that slot that's fine.

**Chairperson:** It look like it's going to be a lively debate and I'm seeking not going to quail it but if that Mr. Skosana was indicating at this Mrs. Pandor.

**Respondent:** It just the support my colleague there while we are unaware of political disposition most of the people involved in the programme here while really they should also be aware they are political disposition by then to stress the principle of fairness and impartiality I think we all know during process were Professor Kadar Asmal is involved he would express party political view, I thought we would be fair to one another.

**Chairperson:** Mrs Pandor: I'm very concerned Chairperson about the kind of presidency we are trying to set really to think we are clutching at straws we have John Duggard who is one of our Technical Committee members who is speaking in this conference one we now to say that John Duggard is not speak.

**Response:** We are referring to members of the Theme Committee that I think that's were the problem is arising let us first impersonal about that the question if whether.

**Speaker:** But that is personal Mr. Kadar Asmal is known or well known in the experts on Human Rights in the Constitutional Law. However, could I say we are budgeting beyond ourselves because as I see it this seminar is a seminar organised by the institute with the invited guest they have actually made the selection I'm saying to the institute we wish to advise you, who you invite clearly they have the full preview of expose that is available in this area have made invitations according to those they have achieved would be best present the aspect that I indicated in the programme. I really think Mr Chairman let us not dwell in this and waste our time.



**Chairperson:** Thank you very much I do appreciate that and I do think that there isn't aspect of truth within what Mrs Pandor has said in that the role of Wallenburg Institute is it setting up the seminar into an extent we must be not to be prescriptive.

**Response:** On this specific issue at present Senator Surtee First: OK Mrs Manzini: here I just wanted first to address the issue Chairperson whether this is one seminar or is address by Wallenburg Institute, the Naledi has covered that I would like us to dealt on that issue because that will solve the problem because this debate as far as I'm concerned actually irrelevant.

**Chairperson:** Just hold on please.

**Mr. Bacher:** Chairperson: I will fully agree with that view which is not slated on Page 14 on our agenda are very clearly said in our own South Africa Parliamentarians on Human Rights and write viewed to say all by the National Assembly. South African Parliament and for the route Wallenburrig Institute for Human Rights and Humanitarian have Universities of lassitude if this case as it is stated here and I'm absolutely state but we cannot give a politician a platform when a National Assembly is organizing this thing.

**Chairperson:** Thank you, Miss Vos, you wanted to say something.

**Mrs Vos:** I wanted to follow on, but I don't think this debate that is a fair comment to make a matter of principle we discussing here, if we follow on Miss Pandor indeed we have nothing to do why is it on our agenda? Is being raised because it indeed we are going to conquer it should not appear on our agenda the fact is out to be in our rubber stamps and not discussing Professor Asmal per say it could be discussing it could be discussing it could anybody else in the ANC is a principle to have a professional person we too have professional persons we would like to see there it that is the question. Thank you.

**Mrs Manzini:** I think it is relevant before in the Wallenburg Institute I think all of we were asked to come up with names of South African experts who can help.

I think we discussed that at least, I think that's the name of Kadar Asmal came and many more who feature here and we didn't think this would be conducted by people have outside we wanted also the South African input on this and I think at the present moment we as the Theme Committee we are supposed to refer to the issue of how we wanted this seminar to be to the Theme Committee to the co-group and I have made reshuffling of this whole thing of the whole programme as it stands at the moment. So the Kadar Asmal issue that why I'm saying is irrelevant.

**Chairperson:** Thank you, any further views?

**Mr. Mdladana:**

I wanted to propose that perhaps we close this issue at that point because I remember that in the co-group we cleared our mind that this programme for the 3rd and 5th of February but it didn't take place. I don't know why it didn't take place it was postponed. It is not our programme we are going to agree if what our programme is going to contain and mostly probably we would say if how our programme is being drafted so really plead that we hold our breath until we see how our programme is going to be structured this one is not for us particularly this Theme Committee it was for the 3rd and the 4th if the people who want to raise about this particular programme it is written here, that is being postponed and we don't know when the next one is going to be. There are channels people want to raise through the speaker the parliament whatever the case might be I would really plead to members to tone down the debate on this particular issue save our breath and especially this particular one.

**Chairperson:** Any suggestion to take this matter allow me even the frame work of the seminar that we want to hold in conjunction with the Wynberg Institute it could be reverted back to the co-group for the further discussion and that we bear in mind sentiments expressed in all sides to the house and that we follow in fact what Shepherd indicated that we draft our own programme by consensus.

**Senator Chetty:**

Chairperson, I intend to bring this matter to rest. I think what has been raised here is an important issue on that on the background what had happened in the past, Shepherd has raised most a important and significance aspect this programme was calculated earlier no stage whatsoever was to any objection for presence of Professor Kadar Asmal in the Programme it was never raised before for all purposes, this programme would have taken place for technical difficulties in the lack of audience did not take place about is an important issue (2) issue taking to account re enhance taking people who are deemed to be experts giving an address be to a Theme Committee or to the public at large. I think one is taking to account about the perception we have in the Technical Committee in this regard we said that, this Theme Committee will direct the process but its not the Technical Committee that is going to do so, having said so what this Theme Committee is saying that and while we are open to various views and various aspects on public submissions we are not dictated by then but not respected on the various parties we are not receptors without questioning them. Who's this can be challenged may be accepted or maybe rejected we change whatever the case it may be it will be a form to our intelligence who to assume whoever is the experts giving or deliberate or giving us address we would accept it on any reservations it will mean this Theme Committee is not capable or functioning in the panel go my submission is that in regarding to the fact that Professor Kadar Asmal is in fact an expert whom and have necessary skills in this particular subject.

There shouldn't be anything to bar him from addressing the particular group and is not addressing the ANC or any particular party but the entire Theme Committee and his views are to be challenged that is the first aspect (2) aspect it is not closed to any other party but participate in other words, if the IFP wishes to put forward an expert on their side they could do so with any parliamentary structure they would have to liaise with the Wallenberg Institute and the whatever parliamentary structure is available to do so, the ANC would not agree with the presence of IFP expert the NP expert or any other expert for on for that matter, and engaging likely debate and exchange views and welcomed by ever and we are willing to listen to public submission this matter while we have a panel expert by is to stand by particular parties its irrelevant by the decision and is the decision of this Theme Committee that there is understood the purpose or the nature of paucity to think in the nature if this panel is understood certainly will not problems of principles of role players and members of the Theme Committee participating in events like this.

**Chairperson:** Thank you very much, we would like to see we do get finally a happy consensus on this issue and we can we refer this matter to the co-group now in detail discussion of the programme, the redrafting agenda and a consensus decision to report back to the Theme Committee.

**Mrs. Mabandla:**

I want to raise two related matters in this regard (1). The concern expressed by IFP about the dates that they probably should indicate, to the co-group re suitable date this and other groups. I tell you the importance of this is being very useful it all members of this Theme Committee.

And are available participated and to be present and just participate at this event (2). That perhaps we need formally to invite our Technical Expert to be present and engage or listen to the deliberations at this Conference. May I say too perhaps to the parties would be thinking about hurting their legal experts to be present and to engage and the important thing is really to engage as my colleague have just said has said lively discourse around, that would be discussed in that Conference in fact I'm just saying this are recommendations that members of the different parties and the core group could solicit their parties.

**Chairperson:** Thank you - Mrs Liebenberg you want to say something.

**Response:** Mrs Liebenberg: I wanted to say something in the last point that was raised discussed with the other members the Technical Committee of offering to conduct a seminar to the Technical Committee of some point of Bill of Rights and the applicability on some of the questions and this is set on the Wynberg Institute seminar and which I understand its own knowledge and the organisers that would certain if proposed in the line of the Theme Committee be available to do so, I think on those lines in on different lines. Perhaps at a different time.

**Chairperson:** Thank you - I think we must see this seminar on the gender item before us part of our Public Participation programme as well in to the extent that the public is being involved and presenting into this Theme Committee especially Experts advice and thoughts on various matters in addition to that it is quite clear in that in our Public Participation Programme.

Theme Committees are entitled to have hearings as one if the two aspects that is important and perhaps that we should have form our own panel of experts in this subject as suggested and also to be conducted here fairly for the job to be it is so thank you very much for that advise. I'm going to propose to note of this now for the co-group. We are going to refer back to the co-group for a complete rehash of the agenda in details and then you report back to the Theme Committee in matters of urgency. We are also looked the dates it is going to be very difficult to change the dates, because availability of certain speakers.

**Response:** Chairperson, in this time of date, can I say something, on Sunday there are people would be a problem including myself.

**Chairperson:** Thank you, can we now move to Item 7 on the agenda to liaison on programme, you have before your report we have previously discussed is this in passing but we haven't had a full discussion on it and I think what is very important on it is to look at Page 31 specifically and mission statement statements on it, on the question of community liaison and the mission statement is to facilitate date and interface dialogue between South Africa people and the elected representative but consulting the population in this level on the various levels of Constitution making and it I'm going on to study it one will see it on Page 32. Item 4 Theme Committees are the involved in Hearings and Seminars it if one looks at on Item 8.4 on Page 34/38 one will also appreciate that and it deals with the actual seminars and public meetings.

We have the situation were we have a request from the administration to consider the practicality and the possibility of why then Cape Town impossible committee people from this group to conduct short seminars and information sessions and here the public in South Africa at large, thinks the way we should go about our job on creating a Bill of Rights so I want to throw this matter open now for general discussion but now we can perhaps have the views on members.



**Response:** Comrade Chairperson. I wanted to request that we be given one or two minutes because of our little report that we have expedite the decision on this one if we would agree to adjourn just for five minutes so that we come back and discuss the issue.

**Chairperson:** Thank you, the is a request adjourn for 5 minutes with that means to the general enough for everyone we need a bit of a break, we are going to adjourn until 11h10 just to have a break wont be long belongs is agenda just for informal discussion.

**Respondent:** I just think its we can move to the ANC component of the caucus meeting I through that we get clarity on the last item before us item I community led on liaison programme are there any further aspects on this one looks on ..... and it looks the and make sure that the IFP and here come back. I think we can proceed now if everybody have a caucus we have Item 7 again before us, I've introduced the subject before us in regard are the any thoughts to how it will go about the Community Liaison Programme.

**Response:** Thank you, Comrade Senator. (May I just ask your name please, James Maseko ??? a new member of the Committee). Yes also I am a new Chairman. The view of the ANC in this matter it is as follows our starting points was the minutes of the co-group dated 8th February, 1995 on Page 10 who noted some of the concerned that the co-group get raised about the Theme Committee Liaison Programme and basically commented.

As follows which regard to the first actually endorsed that concerned as it is stated in the report that there is no outreach programme for annual areas (2) the conception of the programme which emphasize activities that require sophisticated technology and our view on matter is that the way the point I presented there it suggesting we have a phobia against technology and yet that is not the point we the co-group wanted to make so our view is that about sophisticated technology so we can should other method 6 make sure that other methods are accessible to all the members of the public that are participating in the programme. Now with regard to the 3 point regional activity being limited to single venue we endorse that view for you and it one goes through the list of programmes of activities are stated in the report we can look in the sense that will solicit maximum public participation especially in the provincial level because we have one venue in one meeting in particular province. We have also this is to extent a pilot programme especially with regards to February that's why we stated our views final view on the matter and with regard to the fourth point raised by the co-group we wouldn't comment specially on that point because we are not aware not the members of the Committee Liaison Office so we cannot enclose the view on that, in general view those endorse were raised by the co-group.

Now with regards to what is contained on Page 31, the mission statement we agree with the view that the mission statement must be guided with the work of the Theme Committee that is to facilitate dialogue in the people and the elected representative and the next comment refers to what's contained on Page 35 on your document that is the schedule of hearings in our concerned really relates to the targeted groups that is the problem stands. The target groups major state holds which exist outside then and we refer specifically to the fact that there is no mention of the youths, unemployed, rural communities sectors for instance education as a sector to make contribution on the discussion debate on the Bill of Rights and also non-governmental organization and we accept that there could be some difficulties with all regard to that for instance when we are talking about the unemployed who are we talking about organizing from for the missed a conscious explore were not taking our activities to organise the constituencies of people we should ensure the unemployed have a voice in discussion. So what we are proposing the co-group must rework the target?? completely so that all this state closures are accommodated. Our Page 36 of the report. Chairperson 7.B on the seminars the second sentence of that Paragraph proposes that Universities, Technicians and other institutions be approached and convened especially institutes on issues discussed by the Theme Committee where the additions we want to make in that they should also be N.G.O. be approached to target seminars we are of the view that the issue on Human Rights is not an issue that's beyond the debate in the country, a number of important N.G.O.'s actually discussing and debating lots of this also the Theme Committee actually benefit substantially from these kind of experience.

The fourth time of that paragraph talks about the seminar programme responding to the needs of Theme Committee and that it should be guided by the law advises. Advises now we are not certain what is understanding and emerges over the past few weeks on our work.

Our view is that the co-group should be rather be the key bodies as result what is concerned write the legal advises. On Page 38 the very first sentence these I think we are making the same point there, the co-group instead of the Legal Advisor in fact the co-group with the Legal Advisers especially the role on page 39 the first paragraph talk about Theme Committee member to be provided with a brief compiled by the Committee Liaison and law advisors before each C.P.M. also saying that the co-group must play a note which regard through that. The next point Chairperson what I'm trying to summarize now the last point I want to make that the role of provinces is not clearly outlined in the programme. However in our discussion are not on the fact that, this is also discussion that is taking place at on the level of the Constitutional Committee in that parties submissions as to how provinces could pay rent in this whole process especially the role of professional legislature is the any role in the process and it so, what role could they be playing so, especially taking to account that, the pending the whole C.A. process is going to be in by through a C.A. structures as political parties are the key players in that regard, we also proposed that the Theme Committee should also develop its own programme of this hearings it necessary tied of what is happening eliminating from the Community Liaison officer.

Here the Theme Committee must make its own proposals on how we see party political before and that is accommodated in the report the next point is that, the greater interface between work of the Theme Committee and Media office the C.A. because we believe that in fact public participation is also to use a lot of media we utilize with the Media Liaison forum so we actually proposing the greater interaction in a structured manner taken by Committee Liaison the is also the role identified for the media office in essence Chairperson we proposing in fact the pilot programme as proposal should go ahead especially because we are already on the 14 Feb.

And it need to kick off quite quickly so we proposing that the pilot programme goes ahead but with regard to subsequent programmes the co - group should sit down and come with a clear proposal on how our needs as a theme committee can be accommodated in the subsequent programs.

**Chairperson:** Thank you very much Mr. Maseko that ready set out the position of the ANC in regard of this programme I think it is fairly clear for all to see. I particularly like this idea of this theme committee having specific hearings here as suggested I think that would be fruitful indeed. Any other comments Mrs. Vos.

**Mrs. Vos:** I think we haven't had a benefit of an instant caucus and we have to reserve our position on this until we speak to our colleagues in this regard. We have begun preliminary discussions but unfortunately we did not have time to complete them secondly I would like to ask on the thinking on the participation on party political persons in these programmes because of our previous discussion viz. vi the seminars I think we need clarity from constitutional committee or management committee or however is going to make decision because sooner or later you'll have person expert of one or other political party who maybe involved in these programmes, I think we need to have a guideline as to parties can look forward to having their persons appearing in this, what the principle is so that we know once and for all.

**Chairperson:** As I understand that is why the administration specifically the C.A. & CC have suggested that the law advisors be made available from time to time we have heard that when ever there is reference to law advisor it should rather be the core group according to the ANC view that should be distinctly be operative and we would have to have an examination of this aspect in the co-group itself or when we meet and discuss this aspect, Mrs. Pandor.

**Mrs. Pandor:**

Chairperson as I understand it this public participation programme is one that will involve members and which will be driven by members to a great degree they maybe specialist activity that theme committee or institutional committee may propose.

And I'm sure that then we all may have a voice in determining the specialist activity that theme committee or constitution committee might propose and I sure we would have a voice in determine the shape of that specialist activity but in the mane the programme will centre around the participation by members of the.....

**Chairperson:** Thought this proposed programme it the Theme Committee, the meeting is closed.