CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

27 MARCH 1995

WORKSHOP WITH: PROFESSOR VENTER

CHAIRPERSON: Thank you, I see, I just want to give a special welcome to the minority party on my right and to the majority parties on my left, welcome. Thank you, I hope there is no voting going to take place this morning. Are you happy sir? Okay thank you. Nobody is sending out a message to some of our comrades that there is a meeting on here please.

Well having welcomed you, our agenda is before you, I hope everyone has got it. Let me just put it to you. Opening. (2) Minutes of the meeting and the workshop held on the 13th of March. (3) Matters arising. (4) Workshop. (5) General, and (6) Closure.

The main thing today is of course Professor Francois Venter's workshop on the Constitutional Principles. I do hope that everyone received a copy in the last part of last week of his Principles and it is again in your papers today available in the front.

Shall I put point (2) Minutes of the Workshop of last week. Now first our traditional problem of attendance. What are the corrections, will you please put it Sandra.

MS HAYDON: Chairperson, Doctor Rabinowitz is marked absent, she was actually present.

CHAIRPERSON: You should not work so hard Senator Rabinowitz that one can see you. Fill up a bit please. Is that the only one? Any other, I am now on the apologies etc. attendance on page 2 of the documentation. Okay, further. Point 1, page 3. (2) The Minutes, in order.

(3) The Workshop.

(4) General.

4.1. Report from the Core Group.

4.2. The Workshop of the Free State Municipal Association.

4.3. Penguin Phones.

4.4. Review of Constitutional Public Meetings.

4.5. Weekly media briefing.

Yes sir?

UNKNOWN: Chairman, according to my diary (inaudible) ...

CHAIRPERSON: Should we trust your technical electronic equipment Lezaar? Correction.

UNKNOWN: I can vouch for it.

CHAIRPERSON: You can vouch for it. Done, you got it? However do I have a proposal that the Minutes have been accepted? Ja, ja, thank you.

Matters arising from the Minutes? Is there anything specifically you want to mention? My English is just terrible after having been in the Free State this weekend. Please bear with me, it comes and goes. Senator Rabinowitz?

DR RABINOWITZ: Mr Chairman, I may have missed something in between because I was not here for three days but I just would like to know has there been a programme agreed upon by the Core Group for the Penguin Phones programmes and has there been discussion about further work that we could request from the Constitutional advisors?

CHAIRPERSON: Yes we have not got, we had two meetings of the Core Group last week and on the meeting of Thursday I think it was, Thursday afternoon that question of Penguin Phones was addressed again. Unfortunately that, those Minutes are

not yet available and, am I right? Just a moment. Not here unfortunately. They are not ...

MR MUSLANKIE: (inaudible) ... Chairperson can I help? I am here because I want, I wish to help Professor Venter, I am not one of the members. What happened on Thursday was, the head of the media department was invited to join the meeting and to address the meeting specifically on that issue, and what he said was because of the (inaudible) ... of the situation, they found it, you know, necessary to approach parties rather than Theme Committees, so they dispensed with the idea of approaching Theme Committees to help them out, you know, with the problems (inaudible) ...

So now the work is between parties and the media department so it is in a sense out of our hands, out of Theme Committee's hands. That is the position. So we are not in a position to discuss specifically who from our Theme Committee would be attending those meetings.

If people who represent parties attend those meetings also happen to members of Theme Committees, you know, well

and good but you know, we as Theme Committee 3, are not going to say we are going to nominate members to represent Theme Committee 3 per se and to represent issues raised in Theme Committee 3 in those problems.

CHAIRPERSON: Thank you Mr Muslankie. Senator Rabinowitz we will follow this up in any event in the Core Group again. Is that okay? Ja, and then on the work plan. What the Core Group has done is that we had a proposal drafted by Mr Ken Andrew on the work plan now forward and then on Thursday we worked through it and wanted to redraft that work plan in the form of a (inaudible) ... chart.

Mr Muslankie has worked on the matter over the weekend but unfortunately now there are some discussions with the speaker which will affect our work plan forward because some places in the plan up to June there is three days put aside here for Constitutional Assembly work and three days there, that type of thing and we must just await that result which I hope will come from the management committee of the Constitutional Assembly.

As soon as that is available we can finish the programme

which is presently being dealt with by the Core Group. Thank you.

DR RABINOWITZ: That work programme pertained to the blocks and block 2 and 3 and submission or does it also include further requests that we could make to our Constitutional experts for clarification on the way the process works, for the, I know that the ANC has put forward certain proposals, the IFP has put forward certain proposals, to understand those in terms of the German Constitution, the American Constitution, Executive Federalism etc. In fact I have drawn up a list of what I would like explained. I wonder if ...

CHAIRPERSON: Senator ja, most certainly that plan will make provision for that. It is actually a very detailed plan. What we do, we foresaw that there will about three, including the first one, four reports that we have to make still. Now what is done is the activities of every report are being analyzed and put down in a list. For example a first draft and then a discussion here and then refer to the technical experts in which they will react and questions could be asked for them to see this, until you have a second draft and a final draft on

that report.

We really hope that we can steer the process of making our further reports in a more effective type of style and I am sure Peter Smith who worked with us on that thing will be able to inform you also forward and for everyone else, we hope that as soon as we have got the instructions from the Management Committee, towards the end of the week I hope at least.

Mr Muslankie I will give you chance now to give it from your side, then we can finalise that programme and put it next week at this Theme Committee. Mr Muslankie is that the point? Thank you.

Welcome Patricia, you are late. Anything else at this stage, arising from the Minutes? Finished with the point? Thank you. Now could I, before we go on to the Workshop, ask you that we take point 5 General on our Agenda and ask whether there are any matters in this regard you wish to bring up? None? Mr Muslankie?

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MR MUSLANKIE: One matter, actually it can be split into two matters, in that the people who will be representing the Theme Committee at two workshops. One, the workshop which will be held in Bloemfontein and the workshop which will be held in Pretoria. I think members need to know who will be representing, you know, the Theme Committee.

CHAIRPERSON: Ja, could you inform us?

MR MUSLANKIE: There is one workshop which is called Local Government Beyond 2000 which will be held in Bloemfontein and we have got two names, you know, people who will be representing us there, that is Mr Solomon and Mr A Blaas. Those are the two individuals who will be representing us at those in Bloemfontein.

In Pretoria we forced Mrs de Lille, you know, to join the team of four members. Now we are five members going to Pretoria for a financial and fiscal, you know, relations workshop which is initiated by a lack of and commission and provincial government and for that we have members who also serve in our Constitutional committee, that is we are

going to have Professor du Toit, we are going to have Mr Smith, we are going to have Mrs de Lille, we are going to have Peter Smith and we are going to have (Peter who is the fifth one?) and ja, Doctor King. So we have those five members who will be representing Theme Committee at those levels.

CHAIRPERSON: Thank you very much Mr Muslankie. Number one you should not use only force on Mrs de Lille, you should use violence to get her to a place and you should not put me in a delegation with Doctor King, that is also not very wise. Thank you.

Have we finished all those general points? Oh 'moeilikheid.' Now is there anything else that I should address now? Could you help me? Yes lady?

UNKNOWN: Mr Smith was mentioned twice and so we only have four names in fact.

CHAIRPERSON: Mr Andrew seem to be one. Ja I always got it wrong. My is' and are's are not right. Now nothing else? Shall we go

over to the workshop? Agreed?

Then I would like to welcome again our technical experts and they are really now becoming part of a team here and which I think should be our approach here, that we are all comrades in this terrible thing of writing the Constitution except Doctor King of course. She is a lady she is not a comrade but very welcome to our technical experts and could I again while they are here, thank them on behalf of you all I believe for writing all this wonderful stuff for us and especially again for Professor Basson who has done that big work on the submissions which I could not believe came out so quickly.

Well Professor Venter, I think you must come and sit here and I will sit here next to you so that I can go out for a smoke when you start to become boring and then we just proceed. Thank you.

PROF VENTER: 'Jy kan sommer nou gaan rook ja.'

CHAIRPERSON: 'Hy is aan - rooi - so gee dan druk jy daai af en dan so.'

PROF VENTER: 'Ek sien. Goed.' Mr Chairman, ladies and gentlemen thank you very much. I am just wondering if Mr Muslankie is not going to need a chair at some stage. I have been informed that the paper as such has been circulated, so one could assume that it has been read and it would have also been noticed that it is rather a technical submission which I tried to avoid but could not, for the simple reason that we are dealing here with a profoundly technical matter namely, what is the Constitutional Court going to do with the work of the Constitutional Assembly?

That is why I would like as I did in the paper to start off with a remark or two regarding the method to be used which I would like to submit to you for consideration. How can one go about the development of a Constitutional text? The fact of the matter is that the Constitutional Principles are the beginning of the end of the Constitution writing process, and I am overstating it expressly because naturally it is a political process but everything will eventually have to be tested against the Constitutional Principles and therefore one should, could you please open the first point Mr Muslankie. Thank you.

The first thing I am suggesting that needs to be done in the process that we are all involved in here, is that one should test, consider, in other words the submissions and proposals received against the Constitutional Principles. It would not serve much of a purpose if one worked through stacks of submissions only to find much later on, that some of them cannot be dealt with, cannot be taken forward because they are not in conformity with the Constitutional Principle.

My suggestion is that as a method to approach this task is firstly to see what the submissions say as regards the Constitutional Principles but to be able to do that one must know what the principles mean and my attempt this morning is to give some answers to the meaning, to this matter or interpretation, the meaning of the appropriate, and not all of them but those Constitutional Principles that concern the allocation of functions, powers, competencies to the provinces especially in relation to the National Government.

It is quite possible that different approaches, different interpretations could be given to some of these principles. If that were not the case it would have been very simple.

What I have written, what I will be saying today will in some instances I suppose offend some political opinions and in other instances offend other political opinions.

I am not concerned with political opinions, I am concerned in this presentation with the legal meaning, the Constitutional meaning of the Constitutional Principles as one would hope the Constitutional Court will have to be dealing with this matter.

If one uses this method, the second point Mr Muslankie, would then be to consider the preferences of everybody involved, the political parties in the Constitutional Assembly, regarding the submissions and proposals that pass the test.

It is quite conceivable that not only one set of proposals or submissions will conform to the Constitutional Principles. There will naturally be alternatives and then it is a matter of political debate, of political expression of preferences. That is what the decision making process of the Constitutional Assembly, I would assume, is going to be all about but it needs to be done on a firm basis. A firm basis

of the interpretation of the Constitutional Principles.

Then thirdly, the third point would then be to translate the proposals, the accepted proposals, those that conform to the Constitutional Principles and that carry the support of the Constitutional Assembly into draft Constitutional text.

I am putting this in general terms, not only for Theme Committee 3 but I suppose that this is almost an unavoidable procedure to be followed by the Constitutional Assembly as such.

Now Chairman, I would propose that since we are dealing with a rather technical matter, it would work better if we paused from time to time after each section has been dealt with and if you would agree to that we can then discuss it, instead of going through the whole paper and making it very complicated and confusing by throwing everything together. I do not know what happened to the Chairman, he is probably smoking.

CHAIRPERSON: I am here, I am (inaudible) ...

PROF VENTER: But could I ask if there would be any questions or discussion on this specifically, on these few points.

UNKNOWN: On the first point, just in the proposal against Constitutional Principles, in practice what are you proposing, are you saying before submission can be made that the four Principles should be looked at first or should be published to the public so that at least the public is aware that their submissions are going to be tested against you, against Principle 1,2,3, or what are you saying in real terms?

PROF VENTER: Well in real terms I am saying that the Constitutional Principles are supposed to be known but that does not mean that everybody will know their content exactly, and being a matter of legal interpretation, a common interpretation is not, is also not going to be all that simple, and one should not, I think, inhibit anybody to make submissions according to what they really think the Constitution should say.

But when these submissions are considered in the technical committee and in the Constitutional Assembly and in the Constitutional Committee and so on, it is unavoidable that

if it is found that a submission goes contrary to the meaning of the Constitutional Principles, that it cannot be considered and therefore one will need to test any submission against the interpretation of the Constitutional Principles in order to be able to reach a point where a simple Constitutional text can be drafted, which will be certified by the Constitutional Court. Yes?

UNKNOWN: The points that you are raising here seem to be rather general and my concern would be that if one looks at the Constitutional Principles and you do not relate it to the actual specifics of the South African situation then you might land up with a very theoretical exercise at the end of the day that is not relevant to the South African context and requirements.

Should that not somehow or other be incorporated into the process so that the process of testing what should or should not be included is not dealt with as an academic exercise but it is linked directly to the current requirements of where the country is at and where it needs to be moving towards.

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PROF VENTER: Yes indeed I would agree with that, that we are not involved in an academic exercise. We are involved in a political exercise within a Constitutional framework and what I am trying to deal with here is what the Constitutional framework is.

The Constitutional framework is set down in the Constitutional Principles in Schedule 4 which is not an academic exercise but needs to be interpreted. Because of the provisions of the Constitution stating that whatever the Constitutional Assembly comes up with will have to be certified by the Court as being in conformity with the Constitutional Principle. I would fully agree with you that if one made this into an academic exercise or what can academically be called a hermeneutical exercise. That means the interpretation of all these Principles and focus only on that. It would not serve the purpose.

The Constitutional Assembly is in the process of writing a Constitution for the 21st century for South Africa but the constraints or the framework are to be found in the Constitutional Principles and it cannot be avoided. One

needs to work within that framework. It is not possible to ignore it.

MS UNKNOWN: Thank you Professor Venter. I am tempted just to say and congratulate the Theme Committee for finally coming around to accepting what the PAC said right in the beginning, that this is where we had to start but I just want to also ask, as a process matter, you know we also have the independent panel of experts.

Now if we interpret and go along in drafting a Constitutional text and only find at the end that the independent panel of experts interpret in a different way. Will we have to then go back and re-draft that particular part of the text, you know I am just thinking a bit further ahead as to how and what the role of the independent panel of experts will be in the whole process of drafting the text.

PROF VENTER: Perhaps I should just make it clear that I brought up these few points about the method to be used or suggested method to be used because the technical committee has been requested to give an overview of the Constitutional

Principles relevant to the work of this Theme Committee.

That I think is a very appropriate instruction to a technical committee and that is what I am attempting to do, but a situation might arise where we as colleagues in the technical committee have different views on the interpretation and it would be necessary in order to have an effective process, that the Constitutional Assembly comes up with a result that will be as certifiable as possible by the Constitutional Court, and it might be considered.

I do not think it is my place to try to determine or try to influence what might be decided by the Constitutional Assembly, but I think it could be considered to make use of the panel of seven members to assist the Constitutional Assembly to come to an interpretation where there are alternatives which they consider to be an alternative that the Constitutional Court will be able to certify.

UNKNOWN: Just in answer to the point because it is quite important, I mean the Constitutional experts are really only a deadlock breaking mechanism. In short, under Section 73 of the

Constitution, if the required two thirds majority is not passed. In other words if you do not get it through the Constitutional Assembly then indeed that is what their role essentially is, is the act of the deadlock breaking mechanism.

Assuming however that in fact it goes through even with the requisite majority, the real importance of the principles are that it makes little difference whether is goes through with 98% or 99% of approval. At the end of the day the Constitutional Court is still enjoined to test the proposition of the Constitutional text against the Constitutional Principles.

So the, there are two different roles here. The court has a residual role if I could put it that way, it makes no difference at all what happens. These principles cannot be amended even by 100% of Parliament. The Constitutional Court has to look at those principles and assess whether the text is in accordance.

The experts come into play as it were, if you do not pass muster, that is you do not get the necessary majorities.

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UNKNOWN: Under some conditions of course one might want to change it. Let us say now 100% agrees. Do you then have to first pass a Constitution that does incorporate all those Principles 2 that agree that the court can pass this and then you go into the next session where you then change the Constitution in a normal manner, getting rid of it.

UNKNOWN: Simple as that.

PROF VENTER: Well I, this can be very pollical and I do not want to get involved in politics but I think one might be in danger, if that approach is followed, of circumventing the Constitutional provisions which are described in the Constitution as a solid pack but technically speaking it is naturally possible that, it is not only possible, it is unavoidable that the Constitutional text introduced by the Constitutional Assembly will have to contain provisions regarding its own amendment.

It will have to be amendable with the appropriate majorities and so on. But it is not merely a matter of quickly passing a text and then immediately after changing it with for

example an ordinary majority because the Constitutional Principles also require special majorities.

UNKNOWN: Sorry the point is under Section 74 which is the extraordinary one, it said no amendment or appeal of the Constitutional Principles or any provision relating thereto can in fact take place. Now which means even if you did it with 100% majority and I, let us say as an ordinary member of the public, came along and said "I am terribly sorry, you cannot do that" in essence the Constitutional Court would be obliged to set that aside.

They would be obliged to set it aside because in a sense you have got the, when it gets into that dreadful Constitutional argument of where sovereignty lies and whether you can bind yourself etc. but assuming, without that problem for the moment, the way the text reads is that these are beyond the reach of Parliament per se.

UNKNOWN: In the (inaudible) ...

UNKNOWN: No, no, no, this is an Interim, I think we had this discussion

two weeks ago but I think Ms de Lille raised the point previously which is namely you know, what does this apply to. This clearly applies to the Interim Constitution. In other words once you have got through the proposition, if you are suggesting that you have got through the proposition.

I suppose you could have a Constitution which complies with the Constitutional Principles which is certified by the Constitutional Court, which has its own amending powers within it and then that Constitution could clearly be amended and if that was in breach of the Constitutional Principles, well that would be another matter entirely because in a sense the Interim Constitution is then dead, the final one has been certified properly and correctly. That will be different. If anybody would want to do that it is another matter entirely but it certainly technically it could be done.

PROF VENTER: I think the point ladies and gentlemen is that the new Constitutional text is to absorb the Constitutional Principles contained in Schedule 4. These Constitutional Principles have to be translated into a Constitutional text, all of these

Constitutional Principles and I think it would be arguable even that if it happened shortly after the adoption of a certified Constitution that it was changed fundamentally, that it might even be argued that would not be consistent with the process as such.

But can we go on to the next point. The question I would like to ask there is, which principles are relevant and could you open with the first point as well please. The answer is very simple, all principles are potentially inter-related and therefore relevant at any point of time, at any stage of the Constitution writing process and the reason for that is again that the Constitution requires the Constitutional text to be certified, to be in conformity with all the Constitutional Principles and as a matter of interpretation they will have to be interpreted with an approach of internal consistency.

Therefore some of the principles provide some general guidelines for the interpretation of the other principles and under circumstances when you come down to specific wording, one might find that one principle which one might not even expect from this point of view to have an influence

indeed because of cross reference.

Now these principles, you might move it up a bit please now, I think it can be read there. Principles giving expression to specific goals and there are various principles doing that, are particularly useful to determine the general purposes that must be served by the new Constitutional text.

Now I have gone through the principles to identify those. They are the principles that say that this or that should happen in order to, or for the purposes of, leading to, and they are directive principles for, to my mind, the interpretation of all the principles. On the next transparency I listed the notions that emerge from those principles. It is not complete because one might argue that there are a few more but these I think are for the purposes of the work of this Theme Committee, the most important.

The new Constitution must ensure a dispensation which is accountable, responsive, open, financially viable, effective and efficient. Many of those words are general and some may feel they are vague. One cannot do much with them

but that is not true.

The Constitutional Court as any other court will have to deal with these things in a judicial manner and the courts are very well exercised in determining facts in the case and then applying the law to it, and in the process of applying the law to the facts, the courts are very often required to apply objective standards and to interpret what those objective standards in practice, in the situation before them, would mean.

Therefore if somebody went to the Constitutional Court arguing that a text that has produced by the Constitutional Assembly does not provide sufficiently for a dispensation which is accountable for example, the court will have to consider that and come to a conclusion whether it is sufficiently accountable, responsive, open, financially viable, effective and efficient.

Therefore those are general standards, measures against which I think every single vision of the Constitutional text developed here will have to be measured against. Perhaps

we should stop there again and have some discussion or questions if there are any.

CHAIRPERSON: Yes Mr Smith?

MR SMITH: Professor Venter, I am just curious as to what you said earlier, I am not quite sure if I understood it, are you saying that essentially the Constitutional Principles which amount to directives in order to achieve x y z's, those have precedence over the non directive principles in some way. I mean if you, is that a form of ranking?

PROF VENTER: No it is not a matter of ranking. It is a matter of some principles being very specific, dealing with a specific matter only, and some principles dealing with such a matter and adding to it the reasons for the principle being laid down, requiring the Constitution as a whole to conform to that additional standard.

For example, as you have seen I have referred there to Principle 6. "There shall be a separation of powers between the legislature, executive and the judiciary." Now that is a

whole world in itself but it goes on and says "and with appropriate checks and balances to ensure accountability, responsiveness and openness" and what that means is that the separation of powers must be provided for but the Constitution as a whole needs to ensure accountability, responsiveness and openness.

It is here attached to the requirement of the separation of powers but to my mind, cannot be read as reflecting only on the separation of power because it requires the Constitution to, in general, ensure accountability, responsiveness and openness. Then it is not a matter or priority but some of these other principles are, one could call them very straight forward and dry of any directions beyond the principle itself. Let us look at an example. Number 10, "former legislative procedures shall be adhered to by legislative organs at all levels of government." There is no reason given for that, no aim, no goal is set by that principle. It requires a straightforward matter as opposed to Principle 6 and a few others that I have mentioned there.

UNKNOWN: Ja I just want to ask a question as well now. Looking at very broad principles like that, the problem is this Francois,

that if we take the approach as to put it in popular terms, of pure Constitutionalism then sure, the Constitutional Court's interpretation of this will be the guiding light but now, if the guiding and the nautical principle of the interpretation of this Constitution, Interim Constitution and the principles as a whole is democratism ,as we believe it is.

To what extent will the Constitutional Court restrict its activity, its judicial activity, when a democratic structure like the Constitutional Assembly has decided that and that is accountability, and that and that is responsiveness, that and that is openness etc.

In other words there does seem to me to be a difference in the approach possible. In the basic interpretation of these principles, whether one takes the road, and it depends on what the Constitutional Court's attitude will be, of extreme Constitutionalism, judicial activism or whether they will give more, as we believe the basic tendency of this Interim Constitution is, democratism, that when a representative assembly like the CA, has decided this is our actualization of say financial viability, that they will restrict their 'ingryp'

their (what is 'ingryp?') into the whole interpretation of what the CA has decided. I think that is the basic (inaudible) ... problem which we are going to address here.

PROF VENTER: It is a very interesting question and one can debate it for a very long time but I do not think the answer is all that complicated. If such an approach would mean that the Constitutional Court will have to go beyond the Constitutional Principles and consider the kind of majorities, for example, that are achieved in the Constitutional Assembly, I know that is not what you meant but if that were to be the suggestion.

I think it is quite clear and I think you will agree also that cannot be the case because the Constitutional Court has a Constitutional obligation in terms of Section 71 and so on, to, what does it say, it says "the new Constitutional text passed by the Constitutional Assembly or any provision thereof shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles."

Now the Constitutional Principles do deal very clearly and in more than one place with democracy as a requirement of the new Constitution but Constitutional Principle 4 also very clearly says that the Constitution shall be the supreme law of the land, which is typical of the modern Constitutional state. Modern Constitutions are usually the supreme law, the guiding principle, to put it philosophically "the group norm" but simultaneously such Constitutions are also characterised by the fact that they lay the foundation for democracy.

Democracy and the supremacy of a Constitution are not opposites. They are integrated into one another but the Constitutional Court cannot deviate from these Constitutional Principles and cannot, I would submit, allow the Constitutional Assembly to adopt a Constitution which makes a Constitutional Principle fall, renders that principle a relative principle, in other words take away from the requirement that the Constitution will have to be considered to be the supreme law and nothing else.

UNKNOWN: Can I just, I think, you know, without, this is an incredibly

exciting debate for lawyers, it might not be for non-lawyers but it is actually really very important. In this sense I think you are absolutely right to say that at the end of the day one wants to try to give to these Constitutional Principles some sense of concrete character so you can say that is the character of the new South African state which is envisaged in these principles. I mean as a lawyer I would say it is the draconian principles which underline the whole edifice but it is what gives it the character and I think it is quite right, you would have open, accountable etc.

But I do think that, and it is perfectly true, if for example under Principle 4 the new Constitution was not the supreme law of the land, was not binding on all organs, then ja, in other words it was not binding on the executive. It is quite clear then that the Constitutional Court will have to say "we are terribly sorry, you go back and do your job properly."

But take for example the question of openness. I do not think what is possible is if you have a provision which has got a freedom of, there is I think a Constitutional Principle which deals with freedom information.

Now assuming that you have got a freedom information clause there, now the government, sorry, the CA gets up because the matter is being challenged in the, or is in the Constitutional Court and the advocate of the CA gets up and says "well there is a freedom of the information clause in here" and I am, let us say, representing some minority groups in court and I am saying "no, no, no, that is not what was meant."

The point is that if for example I come along and say "look, look at Germany and look at Switzerland and look at, you know, wherever, they have got better freedom and information principles than the one that is in here." The Court is going to say "I am terribly sorry, it is not for us to determine exactly which freedom the information principle is there one, is it real, is it not illusory, is it concrete, answer yes then comfortably go away. It is not for us to start writing a better Constitution than the CA has written. More we are there to test is that you have complied with the requirements.

The content of those requirements to some extent are going to have to be interpreted, I am very intrigued to see how

Francois is going to interpret the one about the "powers of the provinces shall not be substantially less or substantially inferior to those provided in the Constitution" but let us assume we get by that.

At the end of the day no one is going to be able to turn around to the Constitutional Court and say "well because you have not put water in and you put roads etc. that that should be set aside." I mean, what I suppose I am saying is that we must be careful here. I think the Constitutional Court, and obviously we are only giving opinions, none of us know because that is the court, we are not the judges but I think we should realise that your point goes to the heart of the question.

That is that the court will look to see whether the principles have been met, but whether in fact there is a better means of dealing with that particular principle or not, I do not think is going to be the court's role. That is going to be the role of you people here. I think that is really the key to the resolution of this problem.

UNKNOWN: In other words you are saying that it will be a marginal testing and would - when it goes - appreciation. If it goes over the modules - okay then the court will say no but within that there is quite a big scope for the CA to (inaudible) ...

PROF VENTER: Can I also just add to that. It really brings us back to the first transparency where I said that it is required of the Constitutional Assembly to test the submissions in the first place against the Constitutional Principles and then consider the Constitutional Assembly's preferences within the spectrum. The second point up there, within the spectrum of submissions that comply with the Constitutional Principles.

There is naturally a large measure of political scope to make choices. It is not, it is certainly not, and I agree with Dennis completely there, for the Constitutional Court to write a new Constitution if it is not satisfied itself politically with what comes up from the Constitutional Assembly.

Now I think there was a question over here and Ms de Lille

as well. Yes please.

UNKNOWN: I was just going to say a non-lawyer wants to intervene in the debate. I think that it is important to draw a distinction between the Constitution as a product of political negotiations and the notion of democracy. I think there are many notions of democracy in society but not all of which are going to be optimally embraced in the Constitution because the Constitution is a product of political negotiations. It is a product of the balance of political forces within the structure which drafts the Constitution and therefore it is a reflection of a political reality at a given point in time.

On the other hand the notion of democracy is outside of just what political parties think about democracy and you have a full range of them within the South African political spectrum, and in a sense the democratic debate goes on both within the Constitution making structure and out there in society as well.

Therefore the Constitution is going to be constantly tested

about whether it reflects an optimal form of democracy or not. Those who are socialists in South Africa, and I am one of them, will have to constantly ask is this an optimal form of democracy, does it sufficiently embrace participatory democracy? Does it sufficiently empower the ordinary person in the street over and above telling him or her that you actually have certain rights in this country, without empowering those persons to actually get access to those rights and so on.

I think that the second comment I wanted to make is about the role of the Constitutional Court. I think over and above, and I do not understand the concept of the margin, but over and above the legalism that is involved in this, surely a Constitutional Court is also required to be sensitive to historical trends in a particular society, to the social and political direction that a society is actually taking. I think that is the element of democratism that Professor du Toit is actually making reference to.

If it is not sensitive to that, it will not be able to play a forward looking role. It does not necessarily mean that it

plays a political role and you as Constitutional lawyers will know that there are obviously examples of courts that have played both a regressive social role and a progressive social role in other parts of the world.

In Australia you have the High Court making a breakthrough in terms of the model case for example. It has opened up a whole new relationship between Aboriginal people and Australian society. You probably have many more examples of that as well.

So I think that needs to be brought on to the debating platter as well in the sense that a court is not merely a legal instrument. In a sense it has a social role as well. Where that starts and ends obviously is dependent upon the social context.

PROF VENTER: In general I cannot disagree from that I think it is a clinical view, it is not a lawyer-ish view. The Constitutional Court has a job, a once-off job after the Constitutional Assembly has done its work, to adjudicate upon the consistency of the Constitutional text for the Constitutional Principles. It

cannot do that especially not a Constitutional Court. It cannot do that in a vacuum. It has got to take cognisance of the fact that this is not even the end of the part of a process of Constitutional change in South Africa. It has got to take cognisance of where it comes from and what the aims are, where it is supposed to be going to.

The Constitutional Court much more than other courts, has a social responsibility and needs social sensitivity for its work. So I agree with that but it has limits. It cannot act as though it is not a court. It is primarily a court of law. Ms de Lille please.

MS DE LILLE: Professor Venter I just want to understand this correctly. It looks to me we are in a very peculiar situation in this country whereby we have got the constraints and the confines in the Constitution Principles. At the end of the day you also have the Constitutional Court which has got the final say which really makes the 490 elected members of the CA not directly accountable to the mandate that they receive to write a final Constitution.

But it is not my question, my question is, is there any example in the world whereby you have got a Constitutional Court who actually rules on substantive issues rather than only on procedure because I think if we had a court ruling on procedures only, it would have been less binding than now. So I want to know, is there any example where you have got a Constitutional Court in a country only looking and ruling on procedures rather on substantive issues and if so, where do you find this?

PROF VENTER: Let me first say that our process in this country, the one we are involved in right now, is a unique process. It is, I think, one of the great achievements of our country of the past decade, that we have evolved, nobody sat down and designed it, evolved a process of, first of, transition from one system dramatically different from the one in which we went into on the 27th April last year and then proceeding with a further process, the one we are in right now.

In order to get a second chance at writing an even better Constitution, now that might be a matter of opinion, whether the present one is efficient and obviously it is not,

that is why there is going to be a second one. But it is unique and I have had the opportunity to listen to quite a few foreign Constitutional lawyers who thought that this was wonderful. This is a wonderful opportunity for a country, a modern country, to transform itself into a stable and legitimate Constitutional state.

The Constitutional Courts in general deal with substantive matters and not merely with procedure. If it was merely a matter of procedure it would, one would question I think whether it really is a court and not an arbitration forum. So I think the answer to that is, as far as I know there are not any Constitutional Courts that merely consider procedure. Dennis?

PROF DAVIS: You are absolutely right on that, I mean, if I could just explain this, I mean in a way what the Constitutional Court does when it sets aside a parliamentary piece of legislation, if for example the Constitutional Court decides that the Criminal Procedure Act is invalid or whatever the case may be, it is essentially saying to Parliament, you have not met

the substantive commitments of the Constitution.

So it is always doing that, what it is being asked to do now is unique. It is being asked to say does the final Constitution meet the substantive commitments, the commitments of the Constitutional Principles and it is not an unusual task for it in the sense in what it does, it is unusual in the sense of the sheer magnitude that the court has within its power, the possibility of saying it does not matter that 95% of you people decided that this is going to be our Constitution, we do not think it meets the text.

I think that is the point that I wanted to make in relation to Mr Gordhan which was this, that I think what you said is what we have been saying, simply the following, that the court is clearly going to account, clearly going to take account of the political reality in the society.

Quite obvious if it passes the two thirds majority of a democratically elected Parliament, the court is going, what we mean by a margin of appreciation, is the court is not going to then engage in a technical argument as to whether in fact this freedom information course is better than that

one, if I could put it that way. What it is then going to say is the political realities of our democratically elected legislature have come up with this particular Constitutional text and only then if, I think this is the point that Francois made, if the character of that Constitutional text contravenes the Constitutional Principles, I think one must get involved.

You know, I think we must not run away with the fact that the court is going to start looking at everything and putting its own kind of seal of content on each point and I, otherwise it would be a very stupid court to do that. It would then in a sense be appropriating for itself the job which you have to do.

So I think that is what we have been trying to say. It has a role, it is going to have a role as the final stop-cap, the final check but it is not going to be a role which is going to rewrite the text. It is going to be a role which is going to test the text in the broadest possible way in terms of the principles against the text. That is really, I think that is really what you were saying as I understand it.

PROF VENTER: Ladies and gentlemen I think we should go on to the next point, that would be the third transparency, Francois. Can I introduce this by referring you to this third last paragraph on page 2 of the submission itself. I was confronted with a problem of selecting Constitutional Principles to deal with here and it also connects with something else. I am referring to page 2 of the distributed paper, the third last paragraph. The Core Group I think it was, or it might have been the Constitutional Committee, has indicated that it is necessary to try to sort out the extent of overlap between the different Theme Committees and that is almost an insoluble problem.

That paragraph that I am referring to says "Nevertheless this memorandum deals primarily with those principles containing express provisions regarding the allocation of competencies to the three levels of government in so far as such allocation concerns the relationships between governments at the various levels. Some remarks are however also made regarding certain principles relating to structures because structure and function cannot be separated completely." In a specific sense, the nine Theme

Committees are all overlapping, whether that is a good thing one could argue, personally I think it is a good thing.

It does not matter if they overlap because it gives a broader perspective but the point here is that I also had to deal, in order to be able to put the Constitutional Principles concerning competencies into perspective, I had to deal with a few other Constitutional Principles. ((inaudible) ... if you could open the whole thing please.)

You will notice in the memorandum itself that there are headings on Principle 1, Principle 4, Principle 6 and there is also a sub-heading dealing with originality. Now what it says there basically is that those principles proscribe, prevent, do not allow, any secession. No part of the country can be allowed by the new Constitutional text to secede, on the one hand. On the other hand, the court will not be able to certify a Constitutional text which places South Africa in some form of international subordination.

Now that is very academic. It is, I do not think, on the cards at all, but for example if South Africa were to become

part of a confederation of SADEC or whatever, the Constitutional Court would question whether that complies with Principle 1 requiring a sovereign state.

The third point is that regarding sovereignty that it is not required by the Constitutional Principles that the Constitution identify the seat or a seat of sovereignty in South Africa. We have got to see this also against the perspective of our own Constitutional history. Up till the 26th April 1994, Parliament was sovereign and that was because of our Westminster history, our Westminster background.

Principle 4 does not allow Parliament to be sovereign any more. The Constitution is now and must in the next text be the supreme law of the land and that, to a large extent, makes the whole question of the seat of sovereignty an esoterical question.

The battle that was fought, when was it, in the 17th century, the 18th century, between Parliament and the king, the crown in Britain, is wholly irrelevant to our situation.

The next point. Because of Principle 4 as is the case right now, and as is being applied already by the courts, all courts in South Africa, all government authority is to be exercised within the four corners of the Constitution because of the Constitution status as the supreme law of the land.

The next question, the next point there is "how far does Principle 6 go regarding the requirement of the separation of powers?" Now it is argued there that separation of powers is prescribed for all levels of government, national, provincial and local.

An alternative argument is also shown there where people might say well there is no judiciary at the provincial or the local level of government. The separation of power deals with not only legislative and executive but also judicial power. That argument does not work, to my mind. Separation of powers is prescribed, also for the provincial and the local levels of government.

The last point on that transparency is "I am submitting that it is questionable whether the present provincial and local

government systems satisfy the requirements of the separation of powers." Local government is in a state of flux and will probably be in a state of flux for some years to come. Provincial government is also in a state of development.

We have got a completely new provincial system since the 27th April last year and it will take, to my mind, another decade or two before we can say that this is exactly our provincial system. But as it stands, as the provisions of the present Constitution stand, I would say that if those provisions were to be tested against Principle 6 by the Constitutional Court, the Constitutional Court will probably find that separation of powers is not being applied at provincial level.

The next point. The Constitution must be the source of the competencies of all levels of government. That is the meaning of the Principles 18(i), 24 and read with 4 and 15. Now there is a very interesting aspect attached to this whole thing and it is again unfortunately a rather technical legal Constitutional matter and that is the question of originality

of powers. I have given, in the memorandum, some references there for those who might be interested to go into it but the provisions are that national and provincial competencies must be defined in the Constitution and a definitive framework must be provided in the Constitution for the competencies of local governments.

That is important because the Constitutional origin of the competencies of not only the national but also provincial and local levels of government, forms a bulwark around the autonomy of each of these levels and I am not using the word autonomy to set up something to be shot down. Unfortunately the word autonomy, as so many other words like federalism and subsidiarity and all those things, have obtained a contentious nature because of them being used in submissions, especially from political parties, but the fact of the matter is that the Constitutional Principles use, especially regarding provincial government, the expression legitimate autonomy and in the Constitution itself which in Chapter 10 provides for the present system of local government and the foundation for local government to be evolved upon, also refers to the word, or uses the word

autonomy for local levels of government.

I am trying to say that one should not focus too strongly on the word autonomy. I am trying to say that the principles require local and provincial government competencies to be Constitutionalised and that allows a certain and clear measure of legal protection of the autonomy of those levels of government. I think we should stop there for discussion please.

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CHAIRPERSON: Ja. Thank you very much Francois for addressing also the problem of autonomy. Perhaps you need to answer it at this stage, I have just gone into German law on the interpretation of the concept of autonomy and it seems to me that the present result is, it is explicitly put like that by for example for (inaudible) ... in his 'kommentaar' that it is not interpretable, that autonomy, because of diversity of the application of it, it is not possible to interpret it in a kind of unified way.

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I was wondering whether in the future when we come to that point, we could get a small document from the

technical experts on the possible interpretations of autonomy because that seems to be a political problem between the parties at the moment. I am just asking whether perhaps when we come to that point in the future, we could just address interpretation of autonomy, especially as in the German law at the moment.

PROF VENTER: I tend to think that it is not really necessary for the simple reason that as you have put it yourself, it is not possible to define it precisely. Autonomy is a reflection of sovereignty. It is not sovereignty but it is a localised or a regionalised measure of self-rule, independence but never to the extent of sovereignty which means that there is nothing above the sovereign institution.

But to say much more than that about autonomy leads one into the domain of the speculative and the preferential feeling of what one would like to happen. I would be very careful to try to pin it down. I do not think it can be done. Perhaps Deon will sort it out.

CHAIRPERSON: Thank you Deon, there has been decisions of the (inaudible)

... briefed on this but please ...

DEON: I am not saying that I have a full answer on that, it is just that when one comes to local government one could talk about administrative autonomy which means that the local government has certain administrative discretionary powers and one can say they have administrative autonomy but not Constitutional autonomy.

So I think we must, when we come to local government, make that basic distinction, must local government be only administratively autonomous or must it be autonomous in the sense that the Constitution grants it certain regional powers to deal with the matters that are trusted to it.

CHAIRPERSON: You are quite right. If I could just, a small comment on that. It is quite right and also as Francois has put it, the problem lies in this, now again, (inaudible) ... is departing, whether there is, when you use the term autonomy for example in local government areas, whether there is "n onaantasbare sweer' a swear of discretion which cannot be interacted with by other levels of government into that

swear, whether it is an absolute swear and that type of interpretation of autonomy seems not to be acceptable internationally any more.

UNKNOWN: Senator Rabinowitz?

DR RABINOWITZ: I wonder if Professor Venter would be able to give us an idea of those areas in which the Interim Constitution could be found to be unconstitutional if the principles are applied to it in terms of local government.

PROF VENTER: On local government?

DR RABINOWITZ: Ja because you suggested that there might be areas in which it would be found not be in adherence with the Constitutional Principles.

PROF VENTER: No well I referred there to the measure of separation of powers at the provincial level of government. If I could just expand on that very briefly. The provincial legislatures and executives are so intermingled, even more, one could argue than was the case in the Westminster system.

Amongst other things because the mere mathematical situation, 11 members of a 30 member legislature are the executives of the smaller provinces, which means that there is no possibility in tracks for the legislature to effectively control the executive because the executive is naturally also the political leadership in that legislation.

In the larger ones it becomes less of a problem but it still is a problem. If you even compare the largest provinces, the size of their legislatures in relation to their executives, you find that the relationship is much more unfavourable than for example at national level.

Essential to the separation of powers, is that the legislature must be able effectively to serve as a check or balance on the executive and a judiciary naturally also on both and that is not being realised at the provincial level. We are not discussing now the national level but I think it is true of the national level also.

CHAIRPERSON: Deon?

PROF BASSON: Yes I agree basically with what you are saying but aren't we now sort of in the realm where we are still inside the Constitutional Principles because this is actually a matter of degree, isn't it, where you can say separation of powers is better in the United States of America because there is a more clear definition of separation of powers than in the Westminster system but will the Constitutional Court sort of intervene with the degree of separation of powers, as long as you are inside the principle which says there must be a separation of powers.

Can one really say that the Constitutional Court will come and say "this one is better, you should have followed the American example, you should not have followed the Westminster example." for instance.

PROF VENTER: Now I think that bases the point that has already been discussed and I agree that it would not be possible and the court must not be seen eventually to express its preferences on degrees and so on but I am using the example of the present Constitution as an example which to my mind cannot be argued to be satisfying the separation of powers

because there is no attempt, at least the balancing of legislative and executive powers at a provincial level.

PROF BASSON: Sure about that, I mean for example as I understand some of the legislatures, they are providing now for legislative oversight of the executive and that would certainly be possible, that would certainly be Americanism by holding the executive accountable to the legislature.

So it is certainly possible. It might be in fact that is not what is happening in South Africa but I think the Interim Constitution can meet it and I only raised that point not to bait it but simply to say I think it does come back to the earlier point that we made, is, can you actually have a separation of powers in the Constitution, is it precluded or not, is one, and then I suppose the point would be that you would have to do more than that if you are meeting.

I think that is your point, you would have to do more than that if you wanted to meet the Constitutional test. You would have to show that in fact there was some form of division between the legislature and executive whereby the

legislature would have oversight over the executive, whether it be by form of different election a la America, whether it be by form of some other techniques but I do not think it necessarily follows that if certain procedures were put in place at this Constitution the unconstitutional in terms of the principles.

UNKNOWN: Professor the, on the question of the autonomy, this is something that is going to create a lot of problems. Although I hear there are views around that as Professor du Toit said that it is not interpretable. (If there is a word like that).

My concern is that when people talk about local government, they always, well most people, depending where they come from, try to use local government and autonomy as part of the same concept. If this is going to be done in the new Constitution it is going to be a bit of a problem as far as I am concerned because already we have the problem when we talk about, it is linked directly to the competencies given to the various levels.

Now the understanding that I have, those people who support a more federalist approach to things are saying that although they call for maximum devolution of power to the province, also support local government autonomy. Now I cannot see how one combines the two concepts because to me, powers and functions, the moment it is given, and you also say it is autonomous, I mean to what extent can you interfere with that, and it is not, although I hear what Deon said there about administrative autonomy.

If powers and functions are given and you are saying it is autonomous, people can challenge that in a massive way and already it is creating enormous problems in the way that people are interpreting their roles now as councillors, whether they are transitional councillors and we are going to have a situation very soon where people are going to be elected to positions.

I would want us to at least clarify this concept of autonomy and chuck it around a bit more so that we can see where we differ and where we agree because to me it is a very confusing thing in the way that it has been interpreted from

the different sides of the political spectrum.

UNKNOWN: These things are very often sematic and autonomy is a very nice word for political debate and it is also useful I think for things such as Constitutional Principles. But to write it into a Constitution is looking for trouble, in the same way as I am arguing later on in this paper, that one use words without an exact meaning such as exclusivity and concurrency, federalism.

To write into the Constitution for example that structures in the Constitution itself that a specific structure must be democratic, does not say anything because of the various views on democracy. Autonomy is a similar word and therefore I think if one argued for autonomy, one must say exactly what you mean. What do you want at autonomous government at local or provincial level to be capable of doing? What competencies it should have in relation to the other governments but to merely say, to put up a standard in saying autonomy does not mean that everybody understands you as you wish to be understood.

PROF VENTER: Yes I think Mr Smith was first.

MR SMITH: Professor I have got a slight problem with the, when you use words like exclusivity and concurrency as if they cannot, as if it is useless to use them in the Constitution.

UNKNOWN: Excuse me, could we come back to that later on because I am going to touch on that later on.

MR SMITH: Okay, because I think you know, that they can be defined and whereas I do accept that the notion of autonomy is obviously a political rather than a Constitutional concept in many ways and that is, it is a difficult thing to define. There are Constitutional Principles which give us some guidance, like 22 says "the national government shall not exercise its powers so as to encroach upon the geographical, functional or institutional territory of the provinces." That gives some indication at least of more substance to the notion than simple vague terminology.

But I actually wanted to ask you a question arising from this fear. The third fear, I missed the one and the one before so

I cannot comment on those off-hand but the first one there where it says "the Constitution must be the source of competencies for all levels of government."

The following block we talk about the definition of competencies and the framework of competencies to the local government level, and in your text, your actual document you gave us, on page 3 I think it is, page 4 the last paragraph. The first, second line talks about "the word framework suggests a slightly weaker conception of competencies than the word definition does, slightly weaker."

Would not a framework be a lot weaker than slightly weaker and to that extent, to the extent then that local government competencies could be determined by either legislation or provincial, I mean let us face it, nationally or provincially, all provincial Constitutions, would they not negate that top point then? Is my point clear? I am not sure if I have expressed it clearly?

PROF VENTER: I think so, may I just say that the transparency should not be different from what the text says because the transparencies

are based on the text but no, no, but I am trying to say that the transparencies should express what has been said on page 4. It is a fact that the relevant principles 18, 1 and 24 do use different phrases, terms of phrase, for the province and for the local governments. 18(i) Requires a definition of the functions, competencies of the provincial governments and Principle 24 requires the setting out of the framework in the Constitution for local government.

Now I am interpreting 24 as saying that the Constitution cannot be silent on the competencies of local government but it need not be comprehensive. It must be comprehensive in parliamentary and provincial statutes. We might also come back to that and/or because I read Principle 24 to say that the Constitution cannot preclude provincial governments and not preclude them from making laws on local government.

But a definition is obviously stronger than a framework but from the point of view of the Constitutional meaning of original powers, there is a slight difference. I wrote it in that context dealing as you see the heading says "originality

of competencies." Regarding the originality, it is not such a great difference.

CHAIRPERSON: Could I just come in on originality and delegated. The question I want to ask the two technical experts is this one. Now we used to have this question of originality of provincial powers and the difference between originality and delegated powers in terms of the old Constitution of South Africa from 1910. It was actually formulated in the famous case of Middelburg municipality - was Gertzen if I remember correctly in my days of study.

Now, the question is whether that distinction can be used in terms of the new Interim Constitution and the current Constitution which we are going to write. It seems to me that the originality which the provinces did have, the old provinces in the old South Africa, before the '86 legislation promises, was based on the fact that in 1910 the provinces received their original powers from Great Britain in the '99 South Africa Act.

While that situation does not exist in the present context of

the Constitution and I have real doubts whether the distinction between having original powers and delegated powers and the consequent different interpretation of the extent of the powers, can still be used as a criteria. It seems to have been connected with the concept of sovereignty of parliament. These are the provinces in the old Constitutional context. I have noticed that you used the term from time to time and I think this thing has to be sorted out technically somehow.

PROF VENTER: Well this could become a very nice legal argument which I do not think we should deal with here completely but let me respond to that very briefly by saying that we must not approach Constitutional law and Constitutional interpretation as having started completely in a vacuum on the 27th April 1994.

There is the need, not only the need but the Constitutional foundation for the continuity of also the common law and that includes also Constitutional common law which is based on, very much on positions by the courts.

What is interesting about the originality question that arose for the first time in the Union of South Africa in this Gertzen case of 1914, is that the Appellate Division obtained the thinking underlying that decision from Canadian Constitutional law which was already federal in essence. It did not directly relate to the question of the sovereignty of Parliament. What it did do was to identify the status of the provincial legislatures despite parliamentary sovereignty, and as you have seen in the paper on page 5, more or less just in the middle paragraph, I pointed out that if that were the case in a situation of parliamentary sovereignty, it should be much more, even more the case in a new Constitution which is the supreme law.

CHAIRPERSON: Senator Rabinowitz?

DR RABINOWITZ: If I could I would like to take the debate a bit out of the technical into the practical and think from my own point of view, I am, to a large extent at a loss, I do not how much I reflect to other members' situation as well, but it would be very useful from my point of view, to understand in real terms how this system works at the present time.

My impression is, with the understanding as I have it, is that our local government does not have original powers to create legislation but has administrative competence or executive competence to execute laws, or it can pass ordinances but it executes functions which are drafted by provinces as delegators or in an agency way but the laws are made by the central government. Is that a correct interpretation or not?

UNKNOWN: Can I just ask that question in a slightly different way before you answer? Can you clarify, and I think that is the point that Doctor Rabinowitz is making, is what is an executive power, what is a legislative power, what is an administrative power? I think you can then, if you can take a concrete example, for example on the question of water or education, whatever the case may be and how do you apply these three notions, either collectively at three different levels, or separately at three different levels of government?

UNKNOWN: Fine. That is the kind of question one really likes to get in class also. Yes? Would you like to add to that?

UNKNOWN: I think this is going to be a very nice discussion because it actually locates some of the issues at a practical level, we will make it more possible for more people to participate and therefore I want to suggest we have the break now that the Chairperson did not ...

CHAIRPERSON: Thank you. Just about the break, Mr Muslankie has informed me that the break should be in ten minutes from now so then we have coffee and tea available, so we just wait for the coffee and tea to arrive and then we make the break and then we can have a big caucus and attack these people who are against us. Okay?

UNKNOWN: Perhaps we can get, before we drink and smoke and so on, just focus a bit on these technical terms that have very important practical implications. The separation of powers doctrine requires a number of things. It requires in the first place the distinction to be made between legislative executive and judicial powers.

Now let us start off from the clearest one, the easiest one. Judicial power. That is the competence of specific

component of the state to adjudicate upon matters, that means the courts. The courts is usually the component which is responsible to adjudicate upon disputes between individuals or between organs of the state and individuals or even disputes among organs of state.

The courts are empowered by the Constitution to expertly and finally adjudicate on those disputes, especially in the Constitutional state you eventually have a court, a Constitutional court which has the final say in these matters.

The doctrine of the separation of powers deals with the whole of all the powers and functions, competencies of the state and divides it neatly into these three pockets. Now having spoken on the judicial powers we come to the executive and the legislative.

The legislative powers are simply those competencies allocated at any level of government to make laws, binding everybody in that country. The structures that can make laws and the procedures according to which those laws are to be made must be provided in the Constitution. That is

legislative power.

Now these laws have to be put into practice. They have got to be executed which is another rather strange word if you think in terms of criminal law, but they have to be put into practice and that is usually the part of the totality of the competencies of the state which is entrusted to a government, usually a cabinet at national level or similar structures at provincial and local levels.

What sometimes confuses people is the distinction between these executive powers and administrative powers. It is a bit confusing because the executive normally controls the administration. The civil service for example is under the direction of a cabinet, of Ministers and the President and so on but I think it is useful to not confuse the administration, the civil service, with the executive, because the civil service also does something more than merely (Inaudible) ... and so on and although there is a certain solidarity if you wish, between the executive and the administration, they are not exactly the same thing.

This is demonstrated very clearly at local level because the part of our local government system that has developed over more or less two centuries, one and a half centuries in South Africa, the White local government, has become very sophisticated and its administration has also become very sophisticated.

The political part, the councils, and I am in danger of getting into trouble here, but traditionally the councils has been very dependent on the administrations at local level but then just to complete the question the answer to the question also of Senator Rabinowitz, at local government level, and I am speaking now of the sophisticated system of local government. There is also a distinction between legislative and executive and administrative functions.

Local government councils do have a legislative competence. They have always been able to make by-laws albeit quite limited and very often within the framework of either provincial or national laws, but they do have to pass by-laws in order to be able for example to raise taxes. That is not merely an administrative function which has originated at

national or provincial level and obviously those by-laws and also functions that have been delegated from national and provincial level to local levels, have to be executed by the executive structures at local level and also by the administrations.

There is one very important difference that was brought about by the present Constitution. We, in the past spoke normally of local authorities, local administrations and those kinds of words. Now in terms of the Constitution and the Constitution of Principles this has become local government which has elevated the local government level to something much more important than it was in the past.

I would read it in the context of the idea which permeates the whole Constitution and the principles that government should be brought as close as possible to the people and should therefore also become much more democratic and therefore accountable and therefore is also to be in doubt with more actual legislative and executive and administrative powers.

CHAIRPERSON: Thank you very much for that answer. I think we should just hold our horses at this stage a bit and have our break now and then we can continue. Sorry? I beg your pardon? No, no, have a short break, not more than ten minutes. Thank you.

ADJOURN FOR TEA

ON RESUMPTION:

CHAIRPERSON: (Inaudible) ... for this meeting of 12 o'clock and the ANC members just stay behind after that. We are moving on now. Could I also request that I have asked Professor Venter to push it a bit and that we will not give a lot of questions in between now, and then at the end we can give questions please. Doctor King?

DR KING: Mr Chairman yes it would help because a lot of our time has already been taken by 'baie hoë bokant onse kop' too high that we cannot come by our arguments and can we ask that we now please stay on the level where the rest of us right here down on the gravel are able to understand. If those gentlemen who has used up the time until now will

just be quiet so the rest of us can get an opportunity to answer.

CHAIRPERSON: Professor Venter, no more questions by any person with any academic background any more and that excludes Doctor King especially.

DR KING: Legal background.

UNKNOWN: (Inaudible) ...

CHAIRPERSON: No, you also stop now and please come to the grassroots.

PROF VENTER: Thank you. Ladies and gentlemen within the three quarters of an hour I think it would be possible to go through everything but it will completely impossible to discuss and deal with these things. I think you can leave the whole lot open, thank you. Thank you Basa.

Because of the principles, especially Principle 18(ii) and that is on page five of the memorandum, it is unavoidable that the present provincial dispensation will have to be used as

the point of departure. That is because of the requirement that the competency should be not substantially less than, or substantially inferior to, what the present Constitution provides for. Which competencies are referred to when it says not substantially less and inferior to. All competencies I am saying which are provided for in the present Constitution, that does not mean only those that are listed in Schedule 6. I am not putting that correctly. It does not only involve Section 126 and its reference to Schedule 6. It involves everything the Constitution provides for.

In the second last paragraph of page five of the memorandum you will find a reference to a number of the provisions of the present Constitution that contain empowerments of the provinces. That list might not even be exhaustive. There may be quite a number more than those that I pointed those out as examples.

Another point that one should be clear on is that this Constitutional Principle 18 does not focus only on the functions that have already been taken up by the provinces. As I suppose everybody knows, a province can occupy a

functional area or part of a functional area and right now by passing a law. Until it does so, and it is not, the matter has also not been delegated or allocated to the provincial executive.

It remains within the domain of the national government. That also leads to a defacto situation of asymmetry. One province may take up some of these functions by passing laws and others might not. Now the Constitutional Principles do not refer only to those areas that have been occupied. It concerns everything that the provinces may do and those are the competencies that should not be substantially less or substantially inferior.

Thirdly, Dennis was wondering how I am going to interpret this and the best I can do is to say as the third point there says, the provinces are to remain at least in the position of relative competence provided for in the present Constitution.

What does that mean? It is again not something that we, can be quantified in precise and exact terms. The

Constitutional Court will eventually have to look at the whole thing and decide for itself, are the provinces in a substantially diminished relative position of competence or not. If they are, it has got to be changed. If they are not, it is acceptable, but it is vague and general. It is not possible to delineate this in precise terms.

Both the extent or the quantity of the competencies and their substance, the quality, the quantity and the quality of the competencies of the provinces must compare favourably with the present provincial dispensation, as it can be, not as it necessarily is in practice.

Can I have the next transparency please. This concerns the question of exclusive and concurrent powers. Principle 19 says that the powers and functions at the national and provincial levels of governments shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency and delegation basis. Now there are two very clearly distinguishable components to that principle and I am going to deal with them separately.

Firstly, exclusive and concurrent. We have discussed, two weeks ago I think it was, rather extensively, what Section 126 as in the present Constitution means with reference to exclusive and concurrent powers.

My submission is that as it stands right now, it already provides, if you also read it with other parts of the Constitution, especially Section 37, although it does not use the words, it provides both for concurrent and exclusive powers. Both on national and provincial levels. That is what I am saying on page 6 of the memorandum in the third paragraph.

I am going to read that "A proper interpretation of Section 126 and the contemplation of the meaning of the words concurrent and exclusive, shows that subsections 1 and 2 clearly provide for concurrency but subsection 3 allocates exclusive competence to the provinces regarding the functional areas listed in Schedule 6 and subsections 3 and 4 allocate exclusive competence to Parliament in so far as it passes laws within the prescribed limitations and Parliament also has exclusive competence regarding all other matters in

terms of Section 37 of the Constitution."

This I mentioned in the memorandum merely to reach a point where one can use as a point of departure, and I am not suggesting that this needs to be done by the Constitutional Assembly but for discussion purposes, one can use the present dispensation to clarify what the Constitutional Principles require and to discuss it. My submission is that the potential confusion inherent in the terms exclusive and concurrent should be avoided, as the word autonomy must be avoided, and words such as subsidiarity.

I am not saying it must be avoided in the debate, they are probably essential to the debate but in drafting the Constitutional text these words will not contribute to my mind, clarity. They have a greater potential of confusing the issue.

The second part of Principle 19 deals with the notion of one level of government acting as the agent of another or being the recipient of delegated functions. Now again, if the

lawyers present would have their own meeting, they can probably discuss this for a month and I would not like to complicate the matter by making it too technical.

I just want to put this on the table and that is that the word agency and the word delegation, these notions are very well known concepts in law but in public law, in administrative law and even more so in Constitutional law it is not clear exactly what they mean and the only point I would like to emphasise very strongly here is that since the Constitution must deal with agency and delegation, it is necessary to do it very clearly. This is going to be breaking new ground. If it is left to be interpreted as it is done in common law, in the law of contract, the law of agency and so on, it is going not to support a clear interpretation of the Constitution.

Then the last transparency please. Now this last transparency is the shortest but probably deals with the most important problem and that is the application of the criteria for the allocation of competencies as described in the Constitutional Principles.

This is such a vast area that I have despaired but it would not be possible within a single submission or memorandum to exhaust it and therefore it led me to try to put it in as compact as possible terms by using Constitutional text, draft Constitutional text, but on that transparency as a form of introduction really, it shows that according to the principles and the criteria prescribed by the Constitutional Principles, no aspect of the Constitution should undermine national unity, deduce provincial autonomy or impose a cultural melting pot, to use an American term.

Those are the implications as I see it, of the criteria prescribed for the allocation of competencies to the provinces and the rest of those criteria are so wide ranging and spread among various Constitutional Principles but especially in Principle 21 and its sub-paragraph that I would suggest, and I would not like to impose this on the technical committee, Chairman, but I would like to suggest that one could deal that appropriately by discussing a possible text. Let me clarify this without any doubt.

I did not produce this for the purposes of trying to persuade

the Theme Committee to adopt this text. This is not what we are supposed to do, I think. I drafted it as a kind of an agenda to discuss the various criteria and it is completely up to you Mr Chairman to decide whether you want to do it that way. If you decide to do it one could go through the various sub-sections one by one but that I would like to leave with you.

CHAIRPERSON: Well, Professor Venter we can only thank you for what you have done so far. I will give chance for questions now. A wonderful piece of work, very provocative I may say, also with a lot of political implications for all of us.

I would like to say that this is a definite alternative interpretation of the Constitution and the Principles which you have heard now. It is not the same as for example, which are loose in other circles like the ANC for example. There is a difference possible on this.

Now I think we have got a good start on these Principles. Of course I think it would be reasonable to expect now all the technical experts to give their, in due course, next week,

week after that, to give their reactions to this interpretations which we have received now, especially this approach that the system.

The provincial system as such, should take its point of departure in the present Interim Constitution, whether that is the view of all our technical experts, of course we sit here and listen to these technical opinions and we also need time to reflect on and consider thoroughly this very big work you have done for us here, although but 'wat is ongeskrewe?' there are some controversial elements in it I must say. I, of course I play politics you know.

Now well, let us afford the chance for questions now to Professor Venter. I have seen first Doctor King there, two, three, if I remember rightly, four, I hope I remember them correctly. Doctor King?

DR KING: Mr Chairman I do not want to ask a question, I simply want to ask whether it is possible for us to get a copy of those shorts ...

CHAIRPERSON: Already arranged.

DR KING: Thank you very much.

CHAIRPERSON: Ah, Adam?

ADAM: Thank you Mr Chairman. I have no legal background. I am a teacher by profession. Quite often when I sit here I always go out, I often go out to a very large extent, very dissatisfied and perhaps confused because it seems to me perhaps it is because of the legal use of the language that is used here. I go out not really understanding the arguments on certain things.

For example on page 7 there is talk of provincial autonomy, that is the top paragraph, "provincial autonomy is qualified by the word legitimate which is in itself an imprecise concept but seems to prevent in this instance the viability of an argument in favour of extending provincial autonomy beyond a level of generally acceptable rational justification.

The Constitution provides that there shall be levels, there shall be devolution of powers to the different levels of government." I do not understand therefore what is meant by legitimate here. When will the powers be legitimate and not illegitimate by the same Constitution and by the same government and also, I do not understand what this means when it says "to the level of extending autonomy beyond the level of generally acceptable rational justification."

I always, it always sounds to me just as splitting hairs quite often and finally the Professor talked of refuted means, the use of terms like concurrency, autonomy, exclusivity as not quite relevant here. Now I really do not understand and therefore would wish for a more clarification on these things. I have some ...

CHAIRPERSON: Thank you very much. Let me such add that you must be very glad that you have got no legal background because the reason why lawyers come across confused, is because sometimes we are very confused ourselves, so - Professor Venter?

PROF VENTER: Thank you Chairman, I am not too confused but I am also a teacher of profession but I do not have any teaching education. No, those are very valid questions. One, I think the answer lies in the fact, and those present who have been involved, who were involved in the Kempton Park procedures will I think, be able to support what I say when I say that these Constitutional Principles were formulated since the days of CODESA in conflictual political debate. They were not primarily drafted as a legal document and therefore there are many terms in these Constitutional Principles that deflect a certain political compromise or consensus enabling the process to go forward.

The word legitimate before provincial autonomy, I would suggest is one of those. Some, in that process where these Constitutional Principles were formulated, were pushing hard for full provincial autonomy. Others were not as enthusiastic about autonomy and the compromise was, well let us qualify autonomy with legitimate, and now we and the Constitutional Court eventually, will have to give a legal meaning to these things because they have a legal implication.

The best I can do, most probably other people might be able to do better, but the best I can do to give a legal meaning to the word legitimate is to simply say well if somebody wants legitimate provincial autonomy, there will have to be an arguable limit to that. It does not mean sovereignty.

It does not mean no power at all. There will have to be a good logical argument satisfying a legal mind, the mind of the Constitutional Court that the measure of autonomy provided for the new Constitutional text is legitimate. The word legitimate itself means generally acceptable and the way I translated it eventually was rational, logical.

Turning to words such as autonomy, exclusiveness, concurrency and so on, I did not intend to convey the idea that they are not relevant. I think they are very relevant in the political debate. All I am saying is that when the Constitution itself is drafted I would plead with the Constitutional Assembly not to use those words because what we need is a clear Constitution and not one which uses words that create new contentions and the lack of clarity.

I think there is a general acceptance, if I read it correctly, that the new Constitutional text must be more concise, more precise, better understandable by everybody and it is not going to achieve that aim if words that have a wide spectrum of meanings are used in that text. That is what I really have in mind.

UNKNOWN: If I could come in Chairperson?

CHAIRPERSON: Yes, please.

UNKNOWN: I think also the concept of legitimacy here could be interpreted in the light of Principle 21(i) which says that we should locate powers at a level which can most effectively, you know, execute those powers and take decisions and that therefore.

If you give autonomy to a province to exercise certain powers and that autonomy or those powers do not be defectively exercised by the province, therefore you cannot say that they, the province legitimately is entitled to use those powers. I think that is the other way in which you

could look at the whole question of legitimacy.

Then also I think that the point you have raised about the language that is used has been raised elsewhere as to whether the Constitution has to be drafted in these terms which are always better understood by lawyers and not understood by the rest of the population.

CHAIRPERSON: Thank you very much. Could I just make a small comment before, I think Patricia is first, then Senator Rabinowitz, on this discussion. The problem seems to me all the more when we use words which has a latin route. It is always terms like autonomy, exclusivity, concurrency, which gives the problem for understanding and I think as a general rule we should tend to not use words, English words which comes from latin origin.

Let me give you an example please. Concurrency, it simply means in latin, to run together. That means if powers run alongside each other, that is what concurrency in its literal meaning means, but that is why from our side we did normally agree it says the only meaning or relevancy of

concurrency is, which, one, win. That is the only problem about concurrency but I think we should, in the new Constitution at least, that is what Professor Venter is also saying, just do not use these type of words.

Now of course he will not agree with what I was saying now but I will give him for reaction, then it is definitely Patricia de Lille, Senator Rabinowitz and Ms Coetzee.

PROF VENTER: Just some comic relief Chairman, I would say that one should not try to use that standard of latin words. Autonomy actually has a Greek route but if we did that we will not be able to use the word Constitution.

CHAIRPERSON: Ag! You win this round man. Now Patricia please.

MS DE LILLE: Professor Venter, on page 6 the second last paragraph, you have quoted a very interesting interpretation there Constitutional Principle 19. Would you mind to give us a practical example of that change around where the provincial government actually delegate to national government. Would you mind to give us just a practical

example.

PROF VENTER: Yes, as I say there it would be very unusual for a level of government which is usually conceived to be on the lower level. You know people tend to speak of first, second and third tiers of government although I do not think it is quite appropriate but people tend to think that local government is less important because it is lower down the rung. It would be strange for upward delegation to occur but the Constitutional Principle, I think can be interpreted to allow for that.

A practical example I think would be where the provincial government has a specific function which only it can exercise in terms of the Constitution and the national government does not have competence over that, which might be called an exclusive function.

If a specific province is not capable administratively to deal with that, it could always ask a national agency or a national department or whatever, to do this in the name of the province, delegating it upwards, but it would, although not

impossible, I would emphasize it would be unusual.

CHAIRPERSON: Okay. Senator Rabinowitz? First was Praveen and then you afterwards.

DR RABINOWITZ: Professor - whether we use words such as exclusive and concurrent or whether we do not use words such as exclusive or concurrent, there is still the potential for confusion and I would refer to page 6 paragraph 3 for example. There your interpretation is that there are in fact some exclusive competencies for provinces, whereas the interpretation of many other people is that there is in fact no exclusive competencies for provinces.

In fact we had that interpretation in our first seminar from Professor Breytenbach, so my plea would be, I do not think it matters whether we use the words or not. What we need is clear definitions in our own minds of what we mean by exclusive or concurrent.

For example the German concept of concurrent is that there is a potential, they could both create laws over the same

areas but once the central government sees a need for an override it becomes the central government's prerogative to create those laws.

In our system there is a different situation in which both the centre and the provinces can write laws over the same areas of competence. For example both over housing, both over roads and then there is this complex situation of overrides and discussion with the various line governmental committees or the Minister about who does what or to what extent the provinces have the competence and to what extent the central government, but there is a great deal of confusion.

From what I gather, in spite of the point that you make about, you made the point there, the criteria for the allocation of competence is that there should not be a cultural melting pot.

What is happening now is that asymmetry is not being catered to because no province is allowed to implement the competencies that it believes it is entitled to until it has

approval through this line function committee that it is entitled to in fact, that all the provinces are in fact entitled to do that.

PROF VENTER: Chairman, I certainly agree that it is very important that one should have clarity in ones mind what you aiming for. That is why I designed that little bit of text at the end of the memorandum which I thought could serve that purpose to clarify in Constitutional terms what the issues are.

Secondly I would just like to emphasize another point and that is that we should not, I would suggest lose sight of the fact that the provincial system is a very, very young one. It is not yet a year old in this country. Although there were provincial or regional structures before and this is a completely new system and the present Constitution is designed and I think is functioning relatively well to phase in the provincial system, not only regarding its administrations.

The consultation and rationalisation of administrations and the settling of new departments and the administrative

structures but also regarding the functions, the competencies, the work being done by the provinces. Why I think this is important is that it is I think clear to anybody who looks at this, that this phasing in process will take many years to complete and it makes good Constitutional sense, and I am not talking only as a lawyer but also as a South African.

From a point of view of good governors it would make very good sense if the next Constitution was also drafted from the point of view of the need to phase in, to develop, to allow, let us call them natural forces of good governments, to have the new provincial dispensation evolve.

CHAIRPERSON: Thank you. We have got 15 minutes left. We have got Ms Coetzee, Ms Gordhan and the national party. Ms Coetzee let us put the question short and then Solly Manie and then put the question short please that we can get as much as possible in before 12 o' clock. Ms Coetzee, Ms Manie?

MR MANIE: Just on a point of procedure. Could we not, because of the time problems I am not sure whether it is a good suggestion,

perhaps take the questions so that Professor Venter could then deal with the questions once he has taken note of all the questions, otherwise I am afraid we are going to run into a time limit.

CHAIRPERSON: Right, let us put the questions in quick succession, formulate as short as possible and Professor Venter will give his answer. Ms Coetzee?

MS COETZEE: (Inaudible) ...

CHAIRPERSON: Please use your microphone.

MS COETZEE: Sorry. In the text of reducing provincial autonomy, I am afraid when we talk about the principles of the Interim Constitution where it says substantially less or substantially inferior.

To my knowledge it seems that it should be concurrent with national but then the Constitution should also define which should be substantial, inferior. Should it be now legislative, executive or administrative and the same should also happen

when it comes to local because we will not be able to have also legislation powers at the local level.

CHAIRPERSON: Mr Gordhan?

MR GORDHAN: I actually wanted to interact with Professor Venter but I will try and reduce it to two questions. The first is that given that we are in the very early stage of the provincial system, is it not correct to say that the interpretation of Section 126 on the one hand, and the gathering of actual experience from 126 has implemented, is actually difficult at this stage.

That the actual concretisation of concurrency meaning what resides within the national and what presides within the provincial is still actually being worked through within line functions and so on.

So what prerogatives National Ministry of Housing would want to retain for itself in terms of 126(iii) has not quite been worked through because we actually, we do not have a new housing Act that we are actually negotiating at this

point in time.

All we have (this is still a question, Chair) all we have would you not agree, is at this point, separation of functions on the basis of existing legislation which is in fact the old legislation, and that the actual concretisation of 126 is still to come within the different line functions. Perhaps I will just stop there.

CHAIRPERSON: Thank you. He is arguing technically in terms of so called (inaudible) ... Who was the other one? Oh National Party, I think.

UNKNOWN: Mr Chairman to save time I will read my question. We make a difference between legislative and executive powers as if it is related to two separate things. In practice it is the same people wearing different hats. In our system, is it rational to make such a distinction and if not, what is the implications or do we need a more distinctive division between the two entities? Thank you.

CHAIRPERSON: Well first, it could have been the ANC policy which you

stated there. Mr Manie?

MR MANIE: Chairperson my question is also 126. Now the concern that I have is that although the people are using 126 to say that it makes reference to the exclusive powers of provinces, it is the way it is written because you could easily turn that whole Section 126 on its head and instead of using the negatives and the exclusions and the conditions, you could re-write it and first state that up front and then say subject to these conditions and these exclusions, provinces would then have the competence in terms of the following schedule.

But now the way it is written I can understand the difficulty at Kempton Park having to accommodate all the various interests but it certainly in my view, would go a long way for us to look at how we phrase what is contained in Section 126.

Then the last point that I, and I would like the Professor's view whether that, in re-writing that, whether that is achievable and secondly, the question then, if there are

certain conditions and exclusions and these national norms and standards and so on, how is that actually physically going to be covered in terms of a mechanism like a monitoring or control mechanism to ensure because the way it is dealt with now, you delegate the powers down or the competencies down and you hope that people will conform to all these things.

If there is not a mechanism to ensure that these things will in fact conform to all those national standards and criteria then how will you do it? Is it by trial and error, hit and miss, and I am not sure whether that is sufficiently catered for in the Constitution.

CHAIRPERSON: This Mr Manie always ask these difficult questions. Any other questions? I think we should stop there to give 10 minutes time to Professor Venter to answer these questions. You had a question, no comments at this stage. Okay, Professor Venter rather, that is after he has taken, if there is time left you can have a chance. Sorry I am not trying to be nasty.

PROF VENTER: Thank you. Chairman the first question of Ms Coetzee regarding executive and the distinction between executive and legislative powers. Should the Constitution distinguish between these things? The Constitutional Principles are silent on this but by implication I think there will be, it would not be as easy to distinguish between these things in the allocation of the functions and the competencies in the next Constitution because of the provision requiring not a substantially less or inferior allocation of functions.

It may be argued, if one distinguished and said well branches are only going to have, this is absurd but are only to have legislative powers and no executive powers. One might come to the Constitutional Court and say well no that is not what the Constitutional Principle wants. The Constitutional Principle requires that both legislative and executive powers have to be allocated in order not to make them substantially inferior.

There is not again a final and a clear answer to that. Many of these things will depend on exactly the wording used and the implication of the wording in the final Constitution.

Mr Gordhan's question regarding the very little experience that we have had with Section 126 it is clearly so that we are in the very early stages of sorting out what can be done at the different levels and cannot be done at the different levels. It is in that respect unfortunate that the new Constitutional text has to be finished within the next year and that is why I would argue as I did earlier on, that one should not block this process of evolution.

I think as it is clear that Section 126 has not been tested sufficiently so that it is quite clear exactly what the provinces will be capable of doing, one can at the same time say that, to stop that process now would cause us never to know whether it would be a good thing for the provinces to have this or to have that specific function.

Concretisation is indeed in the process of coming about but we should not forget that the, all the mechanisms that were designed to enhance this process of evolution have not even been functioning properly yet. For example Financial and Fiscal Commission has only recently been appointed and that is a central, it has got a central role in the evolutionary

process of the creation of provincial dispensation.

I do not understand financial matters myself, I must confess but I do have the impression that it would be possible for the next budget, for the Financial and Fiscal Commission to play an important role in the designing of the capacity of provinces to deal with the functions that they are allowed by the Constitution to obtain. So I think there are good reasons, practical reasons to give it a chance to develop further and not to preempt it by either stopping it or by designing a completely new dispensation, except if it is very clever, the present one cannot work, which I do not think is the case yet.

Mr Albertyn's question, the solidarity or the sameness of the executive and the legislative powers and the people exercising those powers, that has been the case for as long as we have had democratically elected governments in South Africa, and I am using that in the broad sense. Since we have had elections in South Africa we inherited the British system of now real distinction between executive and legislative functionaries.

That system is designed on the basis of the executive emanating from the legislative structures and simultaneously dominating the legislative structures, so that before we went into the present Constitutional dispensation, formerly one spoke in Constitutional terms of Parliamentary sovereignty but it actually was executive sovereignty because the executive structures were capable of determining. (Inaudible) ... structures were capable of determining exactly what Parliament would pass as law. I am probably putting this in more extreme terms that one might always do so but that is the effect of the thing. There is, in terms of the Doctrine of Separation of Powers that must be built into the new Constitutional text, a need for a clearer distinction I would argue.

Separation of powers does not make it possible to distinguish between the legislative and executive have the judicial powers in completely watertight pockets. There must be checks and balances interaction, but in order to make sense of the distinction, it is I think very strongly arguable that there should also be a separation of personnel it is called, in the Doctrine of Separation of Powers.

In other words that the legislative and the executive functions should be exercised by different people or groups of people and that is why there is, to my mind, a need for a clearer distinction between the two.

Mr Manie's question. Section 126 I agree should be re-written to make it clearer what the intentions are. Subsection 3's so-called override provisions are not clear enough. I attempted to do that in the draft at the end of the memorandum. The overrides, which I do not think is the proper expression but that is the popular expression. Is it a controlling mechanism or how, what should be the controlling mechanism for deciding whether those exceptions are to be applied or not. The answer again I think is two-fold.

In the first place conflict should be avoided and there are very good indications I think that in the present dispensation a number of structures are evolving to avoid confrontation, to establish coordination and even cooperation, in an informal manner, by conferences of Ministers at national and provincial level by ten years conferences and whatever.

Those things have developed out of need and it points to a need that should be satisfied. It might not even be necessary to Constitutionalise them but that would be the first level of avoiding conflict and to identify clearly what the meanings are of those qualifications in Subsection 3 of 126 for example.

But in the final instance, in the final instance if there is a conflict that cannot be resolved the courts will have to do it. The courts would and in the very final instance the Constitution Court will have to decide exactly what the meaning of those things are and who really has the competence to perform a specific function. Thank you.

CHAIRPERSON: Thank you Professor Venter for keeping to your time and could we welcome Senator Bhabha because we are now closing. Could I just close this meeting with this observation if I, so that he will be educated in this regard. This observation. My dear friends it is clear that one of the big things which you will have to sort out in this comment is without question on the evaluation or the value we put on the one side on the Interim Constitution as this solemn pact

as it is being said and which you have received Professor Venter's viewpoints, and on the other hand those people, mostly the comrades, who say no, the CA has a democratically elected structure.

Unfortunately history has, I am just talking generally, history has so often shown that solemn pacts just disappear before the sheer power of democracy but we will sort this problem out in time. Thank you ever so much. Goodbye. Sleep tight.

[END]

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