2/4/3/6/2

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT

DISCUSSION ON AREAS OF AGREEMENT AND DISAGREEMENT

8 May 1995
ROOM E249
14H00

(Refer Minutes of 20/4/95)

ANNEXURE A

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3
RELATIONSHIP BETWEEN LEVELS OF GOVERNMENTS

SECOND REPORT TO THE CONSTITUTIONAL COMMITTEE ON HEADING 2 PHASE 1: NATIONAL AND PROVINCIAL LEGISLATIVE & EXECUTIVE COMPETENCIES

DISCUSSION ON AREAS OF AGREEMENT AND DISAGREEMENT

A. INTRODUCTION

In dealing with the question of National and Provincial Legislative and Executive Competencies, recourse must be had to the key Constitutional Principles in terms of schedule 4 which govern this area of the Constitution. In particular reference is made to

Principle XVIII(2)
The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.

Principle XIX
The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

Principle XXI(2)
Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

Principle XXI(5)
The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

Principle XXIII
In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial

governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

In short each of the party proposals needs to be evaluated in terms of the applicable Constitutional Principles.

B THE EXISTENCE OF EXCLUSIVE AND CONCURRENT POWERS.

There is agreement amongst all parties that there should be powers allocated to both national and provincial governments.

The PAC and NP suggest that only the powers of the provinces should be listed. Here the PAC takes the view that the powers as listed in schedule 6 should continue. The NP has added certain powers to those of the provinces including agency and delegated functions, forestry, land affairs, publication control, public works and water affairs. In its submissions the ANC has not yet proposed a particular list of powers to be set out for either the national Parliament or the provinces (but appears to endorse the provincial competencies as set out in the present Constitution).

The IFP lists exclusive competency of the national government but also lists areas for framework legislation and general principles of legislation set out in national directives. The DP sets out lists for both parliamentary and provincial legislatures. In short the DP provides a list of exclusive legislative competence for Parliament and for the provincial legislatures. ACDP lists national competencies.

Conclusion
There is agreement about a range of powers which are contained in both the IFP and DP formulations which would by virtue of the logic of the other more extended formulations given by the other parties be common cause insofar as national competence is concerned. The contentious issue relates to:

a) The extent of the powers given to the provinces per list
b) Where the residue of power is situated. For the ANC, NP and PAC residual power lies with the national entity. For the IFP and the DP (and the ACDP ?) residual power lies with the provinces.

C FRAMEWORK LEGISLATION

There is agreement amongst the ANC, NP, IFP and DP (the other two parties do not seem to have canvassed this issue) that apart from exclusive and concurrent competencies there should be framework legislation at national level within which the provinces are entitled to implement the detail within the framework provided by provided by the national legislature. The ANC and DP have left open what matters should be dealt with by framework legislation. The IFP has specified certain issues in para 1.5 points 1 & 2 of

their submission. The DP has appeared to have left open the details of legislation.

Conclusion.
There is agreement that framework legislation for provincial powers would be entrusted to national Parliament. The only contentious issue are the subject matter which should be dealt with by framework legislation.

D EXECUTIVE COMPETENCE

Both the ANC and the IFP have recommended that there should be executive (administrative) competence granted to provinces insofar as executive national legislation is concerned. (See para 3.2 of the IFP recommendations and para 25 of the ANC). As the IFP and the NP recommended framework legislation, it appears implicit within their recommendations that certain measures of executive competence along the lines of the IFP and ANC recommendations are supported. The PAC and the ACDP appear to be silent insofar as these issues are concerned.

Conclusion
It would not appear to be a contentious issue that certain executive competencies be given to provinces in circumstances where they might not have legislative competence. The details however of where such competencies should be focused is not clear.

E NATIONAL OVERRIDE

It would appear that each party foresees the possibility of a national override. The ACDP suggests that there is an override of legislation (national and provincial) where a law does not comply with biblical principle. The IFP suggests there is an override in the event that a province fails to deliver essential services so as to jeopardise the health, safety and welfare of citizens in the province. In such circumstances the national government may adopt the required legislative and administrative actions, provided that such actions are consistent with similar actions adopted in other provinces and that shall actions shall be valid and effective only for as long as and insofar as the province concerned has not adopted its own adequate legislative or administrative measures. The IFP is silent as to whether the Bill of Rights overrides legislation in conflict therewith. As the Constitutional Principles are clear about the supremacy of the Constitution (CP II, III & IV) and given that there is injunction that the Constitution shall promote gender and racial equality (see CPIII), it would appear that such an override has been omitted because it is not contested. The PAC recommends that the override of national legislation takes place in accordance with CPXXI (significant parts of which have been set out above). The NP and the DP have proposed overrides which constitute variations of section 126(3) of the present Constitution. The NP is closer to section 126(3) than is the DP although it purports to narrow the scope of the override by the insertion of three additional sub-clauses set out on page 11 of the party's submission. The

DP's draft is narrower than the present section 126(3) in that a number of grounds for the override which presently exist have been deleted. In both cases the presumption is that the provincial legislation trumps an Act of the national Parliament save in certain circumstances. This is also reflected in 126. By contrast, the ANC also proposes an override on grounds which are also not particularly dissimilar from section 126 save that the presumption is that an Act of Parliament shall prevail over law passed by provincial legislature unless certain grounds are met and further that the Senate has consented to such legislation. (See para 9 of the ANC's submission).

Conclusion
There is agreement on the need for an override. In all cases legislation which is incongruent with the Bill of Rights can be rendered unconstitutional and hence has the effect of an override. There is also agreement amongst all the parties save for the ACDP that national legislation can override provincial legislation in certain circumstances. The narrowest ground is set out by the IFP while the major point of contention amongst the DP, PAC, NP and ANC turns on the nature of the presumption upon which grounds a provincial legislature can be overridden. This is a dispute which can perhaps can be resolved by testing the respective formulations against the grounds of the override as set out in CPXXI which after all must constitute a basic yardstick.

F THE SENATE

There is agreement amongst the ANC, NP and DP that the Senate constitutes a body capable of representing provincial interests in national lawmaking. The ANC has submitted that consent of the Senate shall be required for all laws dealing with provincial matters and that the Senate should function as a form of intergovernmental coordination. The DP suggests the Senate should have special powers to protect the interests of provinces and promote cooperation and coordination between national government and the provinces and the provinces themselves. The NP suggests that it is strongly in favour of a second parliamentary chamber to represent provincial interests in the national legislature. The other three parties namely the PAC, IFP and ACDP are silent in this regard.

Conclusion
It would appear that it is not a contentious issue.

QUESTIONS OF CLARITY

(Transcript of discussion which took place at the meeting of the Theme Committee on 3 April 1995. Editing minimal)

Dr Geldenhuys — *Chairman, I just also want to link on on this whole question of framework legislation. As I understand it, and I don't want to look for differences where there are no differences, but if you look at framework legislation within the context of*

the proposals of the different parties, within the whole context, then it seems to me that the NP uses framework legislation to sort of strengthen the powers of the provinces, whilst the ANC uses framework legislation, sort of, to restrict the powers of the provinces. I may be wrong. If I am wrong then we have common ground, but that is my assessment.

Sen Bhabha

It raises the question of the same issue Mr Chairperson. What I want to know here is in the input it was said that the framework legislation will come from national level, and then it will be the exclusive prerogative of the provinces to implement a the detail. Those were the words used. Now the question that flows from this is when we talk of onus, let's get the burden of proof here, first of all when we say exclusive prerogative to implement the detail, who is going to decide that this prerogative is being impinged or not? Secondly, on who does the onus of proof lie? Does the province go, if it goes to court and say my prerogative has been impinged, on who does that onus lie? First of all is there is an onus, secondly is there a dividing line between prerogative to implement the detail, and the framework legislation.

Chairperson

Please also inform us whether 'prerogative' is the type of term one should use in this regard. This concept of framework legislation, I think the reason the German literature has made this now out, that framework legislation is definitely considered to be a category of concurrent legislation. There was a big argument about this in German literature, whether this is a separate type of thing or not. I think the conclusion seems to be, please correct me also on this, that this is a category of concurrency.
Now I think just logically Dr Geldenhuys, if the ANC says that in the main, I think the wording is, the schedule six stratification is to remain and then they strongly introduce the idea of framework legislation as the National Party is also doing, and in one of the documents I think the words "augmenting of provincial powers" were indeed used, and that went to the conference of the ANC. By this way, because now it's a different type of, although it's concurrency, but it's a different kind of control, it's a control by way of guiding principles from national level, that's what framework legislation is about, the way I always understood it. So I don't think there is much of a problem here.

Prof Basson

Thank you Chair. Yes I would say that it is correct to state as the IFP also states in their submissions, that actually framework legislation is a category of concurrent powers

between the parliament on the one side who legislates the standards, and the provinces on the other side which fill in the details within those parameters. The ANC specifically sees that as the elasticity of concurrent powers as regarding the possibility of having legislation taken up by provinces within those national standards in the way they seem to think best. So I don't think that essentially one must see it as a way of weakening the provinces. I wouldn't say that concurrent legislation in the form of framework legislation weakens the position of the provinces.

If you give concurrent powers to two different levels of government, then you get a conflict. I think that is where your real problem lies and how you resolve the conflict in the end, where the one level of government lays down the principles of legislation or the standards of legislation, and the other level of government has to fill in the details.

So I would say that, not speaking about prerogatives on the one side or the other, but because the concurrent legislation actually lists the areas in which the national government may make framework legislation, the onus will be on the provinces I would say, to prove that they fall within the general principles or the framework legislation of the national level of government. Essentially then on the provinces will be the onus in any court of law.

Mr Gordhan

Chair, I just wanted to respond to Dr Geldenhuys's point and perhaps help him to understand our position. On page 3 of our submission, page 710 of the party political submissions, under paragraph 12, we indicate our position in terms of framework legislation, where we say that provincial legislative activity should also in addition to its powers to legislate in its concurrent areas of legislative competence be responsible for working out the details of the framework of enabling legislation. It needs to be put more clearly than this, that what we are arguing, is that once we agree upon concurrent legislation, both national and provincial have "jurisdiction" for that particular area, or functional area, let's take education. The question here is, do we leave that as a joint area of activity where somewhere along the middle of that activity both the provinces and the national must decide where the dividing line is? One can argue that at the moment it's left to a race as to who comes out of the first piece of legislation, to occupy some space in that regard. Then the other party will have to sort out whether they want some of that space that has already been occupied or not. One can argue that what framework legislation does, is in fact confines the area which the national legislature must occupy, by saying that you stick to some of the criteria that we have for example under 126(3), and under the

Constitutional Principle as well, and in line with that formulate legislation. At the same time the provinces are given a level of exclusivity, by saying that the rest of the details 'you sort out in legislation that you pass' at a provincial level.
When one looks at page 3, coincidentally of your own submissions, whilst the emphasis here under paragraph D is on lists that you talk of, you say here "a second list of matters should be identified" over "which parliament may only adopt framework legislation". The list is something that we can talk about, whether we should have a list or not or what should be in that list or not.
But where we have common ground is that firstly we agree that there should be framework legislation, and it can only mean that there shall be national contribution towards defining what functions the national government will perform in a particular area of activity through passing framework legislation; and you then go on to say, and we won't put it in this way, but I think again implied as common ground, in order to allow provinces to make detailed legislation on those matters not subject to any other overriding powers at a national level. So in fact we are <u>ad idem</u> on this particular matter, not strengthening or weakening any side. We are looking at, how can you make both national and provincial government perform its work efficiently and effectively without getting into clumsiness, in terms of where the dividing line is between the two areas of activity. I think what the concept of framework legislation does it begins to provide approximate boundaries for the jurisdiction of the national legislature and the provincial legislature, and when you bring the element of onus in we are also clarifying where the limits lie of provincial activity in that regard.

? (ANC)

The question I want to raise pertains to the 'Police clauses' which are listed in schedule 6 from the Constitution, which in turn refers you to chapter 14 of the Constitution which deals with police matters. Now the question I want to know is do police powers have a different character from other provincial legislative competencies?

Prof Basson

They are set out in schedule six as you correctly say as an area of competence for provincial government, and the section in the Constitution that deals with police I would say, is the section that deals with how the different areas, the structure, what is the area of functionality for the police on the national level, where they act on the provincial level and even at local level community policing. So I wouldn't read more than that into it, the fact that it refers back to the fact that it is structured according to the Constitution on

different levels of competence. So it still remains, but one of the levels is the provincial government who has competence on the police.

Chairperson — *But the fact that it is referring to a whole set of norms in chapter 14, doesn't that make it somewhat different than say housing in schedule six, where you have a national framework already, for that type of power in chapter 14, couldn't it be interpreted in that way?*

Prof Basson — In the way of national framework legislation? It's possible, yes, I would say it's a possibility of giving it that.

Dr Davies — *My question relates to B and I am just wondering whether, it seems to me that the assumption which underlies the section B here, is that CPXVIII(2) requires the definition of the list of Principles in the Constitution, a list of powers and competencies in the Constitution itself. It seems to me that that is implicity what is being said in this report, and I am wondering if that is actually the case. This was a point that was referred to briefly by Pravin Gordhan, is it actually necessary, does Constitutional Principle XVIII(2) require that there is a list, a schedule 6 type list in the Constitution? Or could it be covered for example by some kind of a clause which says that the powers and functions of the provinces shall be determined by an act of parliament provided that these powers and functions are not substantially less than those provided for in the 1993 Constitution. Would that meet that Constitutional Principle, that's my question? Or is there an actual Constitutional Principle requiring that there be a list?*

Prof Basson — Yes, I would say that there isn't of course an express provision which requires that there must be a list of concurrent powers as is set out in the present Constitution, and one can read that into the words 'substantially less', or 'substantially inferior', it's a qualitative value judgement. So if one could argue that taking away the lists and replacing it with something else which still is not substantially less or inferior to what the present Constitution awards to the provinces, that will still meet the test, but of course it's a qualitative and a value judgement which is difficult to answer in a yes or no fashion.

Dr King — *Actually I would like to say in reaction to what Mr Gordhan was explaining, that is why at the beginning I asked for, you know that actually should define what we see as framework legislation. We here refer to framework legislation, we specifically say that that excludes then the overrides of*

paragraph 126, and that the framework legislation is then used for those areas which are actually taken out of the old schedule 6 and that we only talk about principles and guidelines. In other words should we use education again as an example? We will talk about for instance providing that all children when they leave school after the year 12 would more or less be the same level, so that when the employer has to make a decision, he knows that a child coming from a difference province would be at the same level. But not other overrides, in other words we are actually, by using framework legislation we are actually excluding the other overrides from article 126. I think that is what we would like to sort of underline, that that is what is meant by framework in our submission.

Mr Gordhan

As I understand it, we might be mixing up terminology, equivalents of essential national standards, minimum standards, etc, etc, that is the equivalent of what 126(3) now. So there is an injunction upon us that there will be a provision in the Constitution which reflects CPXXI(2) and it is on this basis that there will be overrides as I understand it, that the override will be encompassed within framework legislation. So we are talking about the same concepts but in different ways as I understand it. So one is concurrency, CPXXI(2) requires that there be certain national standards etc, that implies an override. An override is not just something in the Constitution. We are saying that framework legislation can give effect to that override, and provide for 12 years of age (or whatever it is that we want) to create as a national minimum or maximum standards, and that the details of education policy or whatever, within the context of those overrides is what the provinces work on, so again I don't see where the differences are. The difference might arise on whether there is a list of issues on which you are allowed to have framework legislation or not, so that's the area, we haven't said whether we want a list or not. The National Party has said that they would prefer a list and that's an area we must discuss.

Prof Basson

In a sense I agree with both the speakers. I think perhaps if I could make a suggestion to talk about prevalence instead of overrides, to say which level is prevalent or prevails in a certain area, then I think one could cogently argue that with framework legislation it's also a type of prevalence for the national government. It has the power to lay down standards and then the provinces must legislate within those standards that is laid down by the national government. So in that sense the national government then prevails in those areas of concurrency. I can understand the National Party's

position that they want the two lists, the one call the one then "real concurrency," where you have areas where both the national and the provincial levels legislate, and you must provide of course, and then you have the problem you must provide for overrides there, or for prevalence, because in the case of conflict. In the case of your other list then for instance for the framework legislation it's also in a certain sense the preference or the prevalence of the national level of government in those areas where it seeks to lay down minimum standards. So if we look at say Constitutional Principle XXI(2), it covers actually both of those instances where it says, 'where it is necessary for the maintenance of essential national standards'. That may be that one says well that is framework legislation, or minimum standards, or where it's necessary for a maintenance of economic unity or that there must be no unreasonable action which infringes upon the, or is prejudicial to the country as a whole, that might then be back to your first list, which says that as far as these powers are concerned, we are now dealing with section 126(3) type of situation where they both have concurrency in the same area, and where we must state expressly in the Constitution how the override will then work, to enable the courts to adjudicate on these types of disputes.

Dr King — *That's where we make a bit of a distinction between principles and guidelines, and on the other side we are referring to standards.*

Prof Basson — There is a difference I suppose. In a principle that has to be followed, and in a standard that's laid down in an act of parliament, yes I would agree with that. There is a fundamental difference there.

Chairperson — *You should remind the National Party of the wisdom that one's principles should be few and good.*

Mr Cronje — *Following on from that now, because in the IFP they make a very clear distinction between framework and general principles of legislation. But when I try and understand what the difference is, it becomes a little bit difficult, and you have not referred to the IFP's distinction in that regard in your framework legislation, so could we perhaps just discuss that, it's 1.5 of the IFP (submission) and also 2.3.1, they try to explain the difference between framework and principle.*

Prof Basson — Yes, they make the distinction and they say that that is the only type of override or the only type of prevalence that would be enough to satisfy the requirements of

Constitutional Principle XVIII(2) and XXI(2). I would say that essentially it deals with the same thing. Framework legislation or principles of legislation is where the national government comes in and lays down certain, call it standards, and then the provinces must comply with those standards within the certain norms that, or the parameters that are laid down by the framework legislation. So in essence I think that is why Prof Davis doesn't refer to that. In essence I think we accept that framework legislation and so-called general principles of legislation is really the same thing, and it might just be a difference in terms, but not a difference in reality.

Mr Cronje — *If the same person sues both then obviously it's different in their minds, if two different people call the same thing by different names then it's maybe not different.*

Prof Basson — Yes, I seem to find it, I don't know what the page is 726 it would seem, 2.3.1 of the submissions by the IFP, "framework legislation obliges the provinces to legislate against standards established nationally", and then 'general principles of legislation oblige the province to legislate against standards in harmony with these principles as defined under ....' So in a sense it says the same thing, you legislate in harmony with standards in both instances.

Prof Davies — *I am sorry I just wanted to come back to the implications of the answer which I was given to the question which I had just now, about the definition of the lists and that it does not appear to be a requirement that the list is spelt out in the Constitution, they could be spelt out in legislation. Now it seems to me that the report as it is written at the moment, implies that they should be spelt out or that there is a agreement that they should be spelt out in the Constitution, and I think that that option is not as clearly accepted by everyone as it appears to be, that as it could also be open to being defined in legislation rather than in Constitution per se, and the issues are not just simply the content of the list but also whether the list is in the Constitution.*

Prof Basson — Am I reading you correctly that you are referring to point A on page 2 of the reports, is that correct? Section B actually of the conclusion?

Prof Davies — *.... B, A and then also when you referred to the ANC submission, the ANC has not yet proposed a particular list of powers in the national parliament or the provinces. It does say that it's broadly accepting of schedule six, but it doesn't say whether that should be contained in the*

Constitution or in legislation.

Chairperson — *Professor Davies, I just want to establish whether we are through with the debate on framework legislation, because I see that also the DP, they are also supporting framework legislation. Maybe it would be interesting to hear their interpretation of framework legislation and then we close that item and then move on to your question.*

Mr Andrew — *Yes, well madame Chair, we use it in a particular context in which we illustrate what we are meaning by it, and you know we are not therefore claiming that is the only valid definition of framework legislation, but on page 5 of our submission, (page 5 of our submission), page 720 of the document, and in 3.6 we are talking about our category of legislative powers listed in our 3.3 (the one starting with the abattoirs), and we say "A law passed by a provincial legislature shall prevail over an act of parliament which deals with the matter referred to in paragraph 3.3, except insofar as the act of parliament is in the form of framework legislation and is required because minimum standards or uniformity across the nation are necessary for a particular function to be performed effectively". So in that sense we are defining that clearly they are frameworks relating to minimum standards and uniformity in that context.*
I think in this regard 3.8 is also relevant in which we say, "if parliament exercises its legislative competence in terms of paragraph 3.5 or 3.6", (3.6 is the one involved in the framework legislation), "the legislative competence of a provincial legislature shall be constrained only to the extent that the relevant parliamentary legislation deals with such matters and expressly or by implication limits the legislative competence of regional legislature". So what it's saying is in terms of 3.6, (which is the one I quoted previously), is that only insofar as that legislation has to do with minimum standards or uniformity, does it constrain the province to the extent that that legislation may deal with other matters it does not prevail over the provincial jurisdiction. In that context we use the term framework legislation. So it provides a framework, in this case a framework of standards within which the province legislates, but it cannot provide more than the framework. It cannot provide a framework other than in respect of those standards, it can't provide a framework in terms of some other criteria that the national government may wish.

Chairperson — *I was going to ask Professor Basson to summarise the three interpretations for us so that we can move forward. Dr Geldenhuys have you got another question relating to*

framework.

Dr Geldenhuys — *Ja, I just wanted to have some clarity on the position of the ANC, it is on page 5 of their position, it is numbered 22 if I interpret it correctly, where they say that "while the weight of legislative activity at the national level of government should be especially concerned with the setting of norms, standards and frameworks", is it the eventual position of the ANC that they move towards the position where the national parliament will actually engage itself exclusively in only framework legislation in all walks of departments or disciplines, and then leave the rest to the provinces?*

Mr Cronje — *That is particularly with regard to the concurrent ones and in the sense that either concurrent or the powers that were given to the provinces as exercising at the centre in the terms of our model. So it's not the national, in other words foreign affairs and things like that, those are exclusive national powers that remain with national.*

Prof Basson — I think we can summarise perhaps to say that there is a large commonality on the issue of framework legislation, and perhaps most parties see framework legislation then as a form of concurrent legislation. I think Mr Andrew made a very good point and it comes out clear in the DP submission especially, where the prevalence lies, that framework legislation is actually a form of prevalence given to the national government. It's a different way in dealing with concurrent competencies. In a certain sense you deal with concurrent competencies at the same time say where the prevalence will lie with laying down of standards, and where the competency of the different provinces is then for adding the detail to those standards that are laid down nationally. So there is an agreement I think between most of the parties, including the IFP then on this issue, the IFP see this as the only prevalence that they would tolerate. They don't want any other national overrides, that's why I think we should stress that talking about override might be over-stating the case. Talking about prevalence of national legislation might be the preferable way of referring to these types of framework legislation.

Dr King — *I am sorry I know you want to move on, on page 5 of the ANC submission 22 which Dr Geldenhuys has asked about now, in fact if you read that and this is what we have been trying to say is where we think that there is a difference in the way we look at the framework legislation. If you read that it seems to be, to me in any case, clear that the executive functions and administration will be done on the*

provincial level, whilst the legislation which is then almost in as framework legislation will be done on a national level, if you read that. In other words we are then talking about delegation, and not devolution, and in other words, framework legislation here is done at the national level and then it is only the execution of it all happens on the provincial level. Now that is totally different way from the way that we are looking at it and I think that our position to, sounds very much the same as the DP's does, where we really are just talking about laying down the principles and guidelines. Standards are already quantitative.

Prof Basson

I don't see section 22, or point 22 dealing with framework legislation per se, because it actually deals with executive functions. Isn't that a different question to say which executive function should be delegated as you say to the provincial level even though the legislative competence remains with the national level. That is a different question of saying we will have concurrent legislative powers in both of these concurrent areas, one laying down the standards the other supplying the detail. I don't know whether I interpret the ANC's position incorrectly, but this is actually where they deal with the possibility of having executive powers also in those areas where the provinces do not have legislative powers but the legislative powers lies with the national government.

Mr Gordhan

I think that Dr King is putting forward is what the press has been bashing the ANC on over the past two weeks or so on, a very misunderstood interpretation of our position. Very clearly we are saying firstly, that there are concurrent competencies and concurrent legislative powers. So that firstly clearly says that the both the national parliament and provincial parliament have the capacity to make laws. We are secondly saying that there will be framework legislation arising from the notion of concurrency, which means national parliament will make laws on national standards etc, etc, in the line with CP XXI(2). You are further saying in addition, or in extrapolation of that, that provincial parliaments will have the right to make laws which elaborate the details of framework legislation. Again your talking about legislation as a separate matter we are saying and that is to strengthen not weaken provinces, that provinces will have not only executive powers in relation to their own legislation, but they will have executive powers in relation to national legislation. That is the point that Prof Basson has just been making. But the last point we want to make in this regard as a part of this package that we are talking about, that provinces (and this is also totally misunderstood

in the press), that in addition to all these powers, both legislative and executive, we are saying that provinces have won a responsibility to co-govern this country. Secondly, that in order to do so, and in order for their voices to be heard at a national level, the Senate is constituted in a particular way which allows for direct provincial representation. We go further to say that as part of that representation and influence that the provinces will have, they can actually at this stage (let me use a very mild word), influence national legislation which has an impact on provinces. In fact they can veto it in terms of our current formulation, and in that way provinces are participants within the national structures ie the Senate itself. So that's the package that we are talking about. In no way is the notion, (except in a couple of lines in the blue document which was a draft document for our conference seen to imply because it was read in a detached way, not really as part of the overall document), that provinces shall have merely administrative powers. So that's not the decision that our conference took, nor is that in any way our submission. So I would like both the other parties and the press to note that is not we are saying, this package is actually what we are talking about.

Chairperson — *Thank you Mr Gordon. So we will now move onto section, are you satisfied Dr King, can we move? Section B and then the answer to Professor Davies' question.*

Prof Basson — If I understand Professor Davies correctly, the A is actually the problem, the extent of the powers given to the provinces per list. It would seem to imply that it can only be given to the provinces per a list that is listed. I would agree that one could take out the words "per list", and say, "the extent of the powers of the provinces is a contentious issue", but not essentially the question of the listing of provinces' powers.

Chairperson — *Any further questions on section B?*

Dr Gendenhuys — *Why did the Advisors put in the 'per list' in the first instance if we can delete it now?*

Prof Basson — I think it was put in there because most parties list the powers given to the provinces, especially then the NP which wants two lists, especially as framework legislation is concerned and the ordinary concurrent powers, and of course the DP sets out the powers of the provinces in different lists. Perhaps the issue is not clearly dealt with. One should have said that even that some parties appear to list only the national powers such as the IFP, and that other

parties, such as the DP for instance lists the powers of the provinces. But I don't think we wanted to create the impression that the only way to deal with the powers of provinces is to list the specific powers of provinces either as framework legislation or as ordinary concurrent powers. So the 'per list' is not so important to say that, perhaps the 'per list' can remain in the sense that it is a contentious issue. Some parties list the competencies of the provincial government, other parties don't. So in that sense it is a contentious issue.

Dr Geldenhuys — *May I ask whether there is another way in which you can get it there without the list?*

Prof Basson — Yes you can make it, especially as far as framework legislation is concerned you can just say 'in all areas where minimum standards must be laid down', or 'across the nation', or 'standards must be laid down', 'the acts of parliament will prevail for instance.' Then you needn't list the powers especially. You can just say that, if this becomes a dispute or an issue, that the powers are given to the central government to lay down the minimum standards for instance. You needn't say it's only in the following areas where the framework legislation will operate. You can say it's in all areas where minimum standards are applicable for instance.

Prof Davies — *I think the other point which I was making as well is that the lists could be an act of parliament and not necessarily in the schedule to the Constitution. So it seemed to me that that issue was not really made very specific and there are a variety of options in that regard, provided that the competencies are not substantially lower, they may be defined in legislation rather than in the Constitution.*

Prof Basson — In a certain sense one could leave the detail then to an act of parliament, but concurrent and exclusive powers of course must be contained in a certain sense in the Constitution, in a certain sense in the final Constitution.

Mr Cronje — *Because we are talking about CPXVIII(2) ('not substantially less ....'), if the interim Constitution does not apply any more, how in the future will a Constitutional Court decide whether the powers that are then exercised by the provinces are not 'substantially less than ....' it seems like the new Constitution will have to contain something that tells us that it is not substantially less.*

Prof Basson — I suppose this is for the Constitutional Court when it has to

certify that the new text applies to the, or agrees with the Constitutional Principles, then the Constitutional Court must make a value decision and say that the text that lies before me today is such that the powers that are granted to the provinces are not substantially less or substantially inferior to those powers provided for by the interim Constitution. In that sense it will be tested against the interim Constitution although that Constitutional of course will make way for the final Constitution. But here we have specifically referred to a certain standard against which we must measure the powers and the functions of the provinces. We must measure it against the interim Constitution and it must not be substantially less or inferior to those powers. So what I am saying is that the Constitutional Court will have to take this into account when it certifies the final text as being in compliance with the principles, and then it will take into account the specific provisions of the interim Constitution.

Dr Geldenhuys

Chairperson I just want to react on Dr Davies' remark. I think there is a difference when the functions of the provinces actually derived from the Constitution in our view, then it actually strengthens the position of the provinces, but when these functions derive from an act of parliament, then there is definitely a difference as far as our view is concerned. So they should actually be granted their functions and their powers by the Constitution, and not by an act of parliament, because that will emphasise the supremacy of parliament over the whole spectrum.

Dr Davies

Chairperson, I think my initial question is important here, because what the Constitution has to provide, and I think CPXVIII(2) says that it has to provide, it has to provide that the powers are not substantially less than those in the interim Constitution. But when I asked the original question, the answer I got was that there was a general statement that the powers and functions of the provinces will be governed by legislation provided that that legislation does not give them powers which are substantially less than in the 1993 Constitution, the answer was that that would suffice. Then I said that that would create the option of defining those powers and functions either in legislation or in the Constitution, and it seems to me that not all the parties have committed themselves to producing a list in the Constitution. I mean I think that the ANC submission as I have been understanding from discussions with my colleagues, is open on that question at this point. I am just saying that the report should not say that the only issue is defining the list in the Constitution, because the other option is still open at this point it seems to me.

Prof Basson

Yes I think the point that Dr Geldenhuys is making is that would it not be substantially less or inferior to, and now taking the powers and put it in the act of parliament whilst the present Constitution actually entrenches the powers in the supreme document. That is of course a question I think we must ask ourselves. I think you can cogently argue that it will not be substantially less or inferior to. Perhaps there is an argument to be made out for the fact that if it's not entrenched in the Constitution it might be inferior because it's now entrenched in an ordinary act of parliament. So one could argue both ways. The question is which argument will carry the most weight I suppose with the Constitutional Court in the end.

Mr Andrew

Yes it seems to me that we are getting - I have been listening and one gets sort of different emphasise and different things even interpretation, and I would argue that CPXVIII(1) says the 'powers and functions shall be defined in the Constitution.' Now that does not necessarily mean that they have to be listed, although one may argue it becomes very difficult to define them if you don't list them, but it doesn't say they shall be listed, but I would certainly argue that the Constitution could not simply say that they will be provided for in an act of parliament which will comply with the 'not substantially less .... substantially more ....' that is not defining the function. So I would say in terms and principle they have to be defined in the Constitution, and again I just repeat that does not necessarily mean they have to be listed. So the point, I don't disagree on the point that they have to be listed, although how you can define them in definitive terms by way of general parameters or whatever, I am not sure, but I would just like to make the point. I don't think that it would be sufficient for the Constitution simply to say that there will be a law that will define them.

Chairperson

Any further questions on section B? We have dealt with section C which is the framework legislation, so then we can move to section D, Executive Competence.

Mr Andrew

Madame Chair under C, just on a point of information, on page 3, the second sentence at the top of the page, "The ANC and the DP have left open what matters should be dealt with by framework legislation", as I quoted earlier on when you asked me the question of how we saw framework legislation, I think we make it very clear in 3.6 and 3.8 in our submission as to what we believe which matters should be dealt with by framework legislation, I don't quite know what the last sentence there, saying 'the DP has appeared

to have left open the details of legislation', I don't actually know what that means, so I don't know whether I agree with it or not, but ....

Prof Basson — Thanks Mr Andrew, I think they mean the same thing, and I'm thankful for your pointing it out, it would appear that we have misinterpreted the DP's position there. The DP as you correctly point out, they first list the areas, and then state those would be the areas for framework legislation, laying down minimum standards and so on. So that must also be corrected, that part of the report.

Chairperson — *Any questions clarity on section D, Executive Competence.*

Mr Andrew — *Part of this exercise is to help get the next draft to the report which is closer to what each of us would find acceptable. There is no reference under D to the DP position at all, which is set out very explicitly in 3.9 and 3.10 of our submission, saying which executive powers are national government and which executive powers are provincial, shall lie in the provincial executive. I won't go through them, but they are set out very explicitly.*

Prof Basson — I also see the PAC has been left out there, because they also have a specific view on executive powers. I will attend to those matters.

Mr Cronje — *Does the DP see at all delegated those where you make legislation then form of relations are too severe in a sense?*

Mr Andrew — *In our 3.11 I hope this answers, if I am not answering your question you can tell me, we say, "powers and functions at national, provincial or local level shall include the power to perform functions for other levels of government on a mutually agreed agency or delegation basis". Sorry, does that answer the question or have I missed the question?*

Chairperson — *Any further questions on section D, except for the omissions of the DP and the PAC.*

Mr Cronje — *.... 'shall' says it can't be executed elsewhere, and you say in 3.11 it can be 'administered' elsewhere.*

Mr Andrew — *Sorry which 'shall' are you .....? Well yes, I think if one were to set it out in sort of more legal terms one should really have 3.9 or 3.10 as sort of A and B and then 'provided that', and 3.11 is 'provided that', so I see 3.11 in a sense is a kind of override or ja, subject to 3.11.*

Chairperson — *Can we move to section D, national override, any questions, clarity?*

Mr Andrew — *Chairperson, Professor Basson, as I have problems with the use of the word override, and I think that, and I am going right to the very end of that just before F, in other words the last sentence in that, where it says, "resolved by testing the respective formulations against the grounds of the override as set out in CPXXI". Now first of all I think that the Constitutional Principle XVIII(2) which has been referred to elsewhere is as important as CPXXI, and I think also to a lesser extent Constitutional Principle XXII is relevant in this context. I agree it is not as important as those other two principles. Secondly there seems to me sometimes to be a misconception of CPXXI in this sense, that it's actually CPXXI which has eight sections to it. Principle XXI is a somewhat composite principle or set of principles, and it in the lead in says nothing about override, it says, "the following criteria shall be applied in the allocation of powers". Now the actual wording of some of those eight come close, or do amount to, overrides or criteria for prevalence, direct prevalence, but many, if not most of them, in fact are simply indicative of where the power should be allocated as opposed to being overrides in their own right. So what I am concerned about is that partly because it's often in discussion used in that context, as if all eight of those are in fact stipulated overrides when in fact they are not, most of them are criteria for allocation, and to the extent that the context in which it's mentioned here in this last sentence perpetuates that, or has a potential of perpetuating that misinterpretation, I think one should. First of all it's not override, it's criteria, and secondly it's aspects of CPXXI as well as CPXVIII(2) and CPXXII. Thank you.*

Prof Basson — Thanks Mr Andrew. Yes I think why those CPXXI(2) and (5) are stressed is because E deals specifically with national override. I would agree of course that it should read national prevalence or precedence or whatever, and that what we set out to do there was to show in certain areas, and the parties agree on this, there must be prevalence for the national level. But of course, and I would support you in this, that all the principles must be read together and balanced the one against the other. You mustn't place more emphasis on some of them and less on the other. They must be read together and there are of course other norms for applying competencies also contained in section 21. It comes across a little bit strong I would agree, because in this instance I suppose we just wanted to stress the ground of commonality that everybody agrees there must be

prevalence and the prevalence usually goes to the national level according to section 21. Of course the others don't really say where the prevalence should lie.

Mr Andrew — *May I just as an example, I think you quoted XXI(5) as an example. Well you see that is an example where it is not an override, in fact it's an allocation to national government. So in fact those matters I would see are exclusive powers of national government, they are not override or criteria for national government interference, in fact they are like defence and foreign affairs, they are matters that belong in the hands of national government. So there is an example of where it is actually an allocation in my view, and not an override provision.*

Prof Basson — Especially I suppose because the wording refers to "be allocated to the national government", is that what you are referring to?

Chairperson — *Any further questions, clarity? We move to section F, the Senate.*

Ms Mapisa-Nqakula — *I do have a question on E. I am just seeking clarity not discussion on this matter. I am not very clear. For instance it says the IFP suggested there is an override 'in the event that a province fails to deliver essential services so as to jeopardise the health, safety and welfare of citizens', then 'in such circumstances the national government may adopt the required legislative and administrative actions provided that such actions are consistently similar to actions adopted in other provinces, and that such actions shall be varied', that's where I had a problem, 'shall be varied and effective only for as long as and insofar as the province concerned has not adopted its own adequate legislature or administrative measures'. Would somebody explain what that means? Because for me it seems there is a contradiction between what is said, the last sentence, and what is contained above. How do you say that the national can intervene, and then again say for as long or insofar as it shall be varied insofar as for as long as the province concerned has adopted it's own adequate legislature? I think there is a bit of a problem there.*

Prof Basson — Yes I agree with that statement. It would appear the IFP on the one hand says they don't believe in any overrides whatsoever, and then in the submission the IFP states that if one province fails to deliver on its competencies the national government can intervene, and in that sense it's an override, or prevalence I would call it. The national

government will then take prevalence in that same area of legislation, but as soon as the province comes in and it takes up those powers of course then the province takes precedence. So it's a very narrow area of prevalence, and I will not go so far as to call it an override, you are correct there. It's not an override, it's just a narrow area of prevalence which the IFP sort of identifies. In essence, I think in principle they are not here to answer for themselves, but I would say that they are opposed to any type of override in the national government side, apart from framework legislation.

Ms Mapisa-Nqakula *In other words it's a contentious issue.*

Prof Basson It is a contentious issue, yes.

Chairperson *Section F on the Senate.*

Sen Bhabha *The sentence goes, 'the DP suggested the Senate should have special powers to protect the interest of the provinces and promote cooperation and coordination etc etc, etc. Are you there with me Mr Andrew? Does the power of the Senate, are there special powers of the senate to protect the interest of provinces, is it limited to matters that affect the provinces, or is there a wider scope?*

Mr Andrew *Well first of all to be quite honest we haven't spelt out and worked through the details on that. But I would see that where we say to protect the interests of the provinces, I would interpret that in terms of our thinking as being on matters that affect the province. So the interests of the provinces are matters that affect them. I don't know if that answers the question.*

Sen Bhabha *It does answer it partially, may I just, if you wouldn't mind, are we saying that then, just to follow the argument, that if there is a matter that does not affect a particular province in the first instance, and provinces in the second instance generally, are we then saying that the Senate does not have a role in that issue?*

Mr Andrew *No I think we are saying, although again as I prefaced my previous remark we haven't finalised exactly because we are grappling somewhat exactly with the correct role for the senate and the composition, and how it's elected and so on. Now I would say that relates to the special powers. So for example you might have something that .... if the provinces in fact the senate has to pass it by two thirds majority, but in normal legislation it just operates in a normal way, you*

know. So I think it's connected to the special powers, it would have especially strong powers in that it would almost, like normal legislation, if the senate voted it down then in the end the national assembly, after certain procedures could override the Senate's veto if you know what I mean. But in respect of provincial matters, if the senate rejected something then possibly the national assembly wouldn't have the right to override the veto, so I would see it in that kind - it's to do with special powers.

(Regrettably, from here on the system failed to record the proceedings of the meeting).