2/4/3/4/9

TC3

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

CONSTITUTIONAL PRINCIPLES RELEVANT TO THE RELATIONSHIP BETWEEN THE NATIONAL, PROVINCIAL AND LOCAL LEVELS OF GOVERNMENT

&

QUESTIONS OF CLARITY

PROF F VENTER

27 March 1995

Constitutional PrincipleS RELEVANT TO THE RELATIONSHIP BETWEEN THE NATIONAL, PROVINCIAL AND LOCAL LEVELS OF GOVERNMENT

Introduction

Due to the binding nature of the Constitutional Principles contained in Schedule 4 of the Constitution, it is essential that the Constitutional Assembly will interpret the Principles relevant to a specific constitutional matter before any decision is reached regarding such matter. In its interpretation, the Constitutional Assembly will have to ascertain whether any particular matter is covered by the Principles or whether the Principles allow for the breaking of new ground.

Where a Theme Committee considers submissions, either from a political or a public source, it should be particularly useful if the Theme Committee were to express an opinion on the consistency with the Constitutional Principles, or otherwise, of the proposals contained in such submissions.

Which of the Constitutional Principles are relevant?

It is submitted that one should assume that any of the 34 Principles may prove to be relevant to the formulation of any specific part of the new constitutional text. The reason for this is to be found in the fact that it would not be possible for the Constitutional Court to certify a new text if any component of such text does not fully comply with all of the Principles. Consequently the Principles must be read as a whole: the implications contained in one of the Principles may influence the interpretation of another Principle.

This may be demonstrated by highlighting some general guidelines for constitution-writing contained in the Principles that should impact on practically all elements of the new constitutional text. Various Constitutional Principles, while dealing with specific matters, require by strong implication that the Constitution must in general ensure that government (at all levels) will be *effective*, *financially viable*, *accountable*, *responsive* and *open.*

- Principle VI prescribes the separation of powers "to ensure **accountability, responsiveness** and **openness**".

- Freedom of information is required by Principle IX "so that there can be **open** and **accountable** administration at all levels of government".

- Appropriate and adequate powers and functions must in terms of Principle XX be given to the various levels of government in order to "enable each level to function **effectively**." This is further strengthened by the injunction of Principle XXVI that "an equitable share of revenue" is due to all governments "so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them."

- Similarly Principle XX requires the allocation of powers and functions to be

made "on a basis which is conducive to **financial viability** and **effective public administration.**"

- Among the criteria for the allocation of competencies, Principle XXI 1 determines that the level of government "at which decisions can be taken **most effectively** in respect of the quality and rendering of services" must be the "**responsible** and **accountable**" repository of the relevant powers.

- Principle XXIX ensures the independence and impartiality of certain institutions "in the interests of the maintenance of **effective public finance and administration**" and Principle XXX requires the public service, inter alia, to be **efficient.**

Although these principles each deal with different constitutional elements, it is submitted that a constitutional provision that purports to establish structures or institute procedures which are not conducive to the effectiveness, financial viability, accountability, responsiveness or openness of those structures or procedures, should not survive the scrutiny of the Constitutional Court, except perhaps if another Principle expressly requires a less effective, financially non-optimal or not fully accountable, responsive or open structure or procedure to be provided for.

The inter-relatedness of the Principles, combined with the lack of clear distinction between the working areas of some of the Theme Committees, renders it impossible to provide a list of Principles falling within the exclusive domain of a particular Theme Committee's work. Thus, where Theme Committee 2 would presumably be strongly engaged in the realisation of Principle VI (on the separation of powers), Theme Committee 3 should, as has been pointed out above, at least consider the possible effects of the Principle on the accountability, responsiveness and openness of the various levels of government. By the same token, every other Theme Committee will need to keep the effects of Principle VI in mind.

Nevertheless, this memorandum deals primarily with those Principles containing express provisions regarding the allocation of competencies to the three levels of government insofar 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.

Principle I - "one sovereign state"

The country is in terms of this Principle to remain a single state. This means firstly that no part of the Republic, be it a volkstaat, a province or any part of a province, may in terms of the new Constitution be allowed to secede and to form a separate state.

Secondly South Africa must remain sovereign, meaning on the one hand that the Constitution may not allow the absorption of the Republic into a supra-national structure causing the diminution of its sovereignty, nor may its sovereignty be

fragmented, for example by transforming the Republic into a confederation of states.

"Sovereignty" in the context of Principle I does however not invoke the Westminster doctrine of the sovereignty or supremacy of Parliament, nor does it express the need for the express internal allocation of the seat of sovereignty, for example in the nation, the President or the provinces. It is submitted that it would in any event not serve a purpose if the new Constitution would designate *the* seat of sovereignty - the battle for sovereignty in English constitutional law between Parliament and the Crown is long past and wholly irrelevant in the modern constitutional state where the Constitution is the supreme law of the land.

Principle IV - "binding on all organs of state at all levels of government"
The supremacy of the Constitution permeates not only all aspects of the law, but also determines the lawfulness (constitutionality) of the actions of every individual or structure exercising governmental authority. Thus the competencies, legislative, executive or administrative of local and provincial governments and of the national government, and of all the courts of law, will have to be exercised within the four corners of the new Constitution. This however does not mean that the Constitution may not itself empower especially the legislative organs at any level to deal with matters not regulated by the Constitution itself.

Principle VI - "separation of powers" (read with XX and XXIV)
In addition to what has already been said above regarding this Principle, one may consider whether the separation of powers is also prescribed for provincial and local government. Some may argue that the doctrine should not apply to the provincial or local levels because only legislative and executive competencies, and no judicial functions, are to be allocated to those levels. Such argument is however not persuasive, because the merits of the doctrine, such as the expressly mentioned "appropriate checks and balances", the separation of personnel and the allocation of legislative and executive functions to different organs, are not diminished at all by the fact that provincial and local governments do not have responsibilities regarding the judiciary. The judiciary, however nationally administered, would still serve as an effective check on the legislatures, executives and administrations at the provincial and local levels.

The prescription of Principle XX that "each level of government shall have appropriate and adequate *legislative and executive powers and functions*" puts it beyond doubt that the legislative and executive powers of provincial and local governments should be distinguished. Add to this the general requirement of accountability, and then no reasonable argument against the application of the doctrine at provincial and local level can be offered.

Regarding provincial government, it is submitted that consideration should be given to the question whether the provisions of the present Constitution (as the only available concrete point of reference) satisfy the requirements of Principle VI. Is there sufficient separation of personnel or separated allocation of functions where 11 of the 30 members of a provincial legislature are invested with the provincial

executive power? Does it amount to an effective check on the provincial executive if the legislature is empowered to pass a vote of no confidence where the adoption of such vote is made highly unlikely by the fact that the Executive Council is composed of the political leadership in the legislature?

Due to the state of flux of the local government system (the present stage of development is labelled "pre-interim", which is to be followed by an "interim" phase after the elections on 1 November, eventually leading to a final dispensation at some future time) a satisfactory point of reference is difficult to identify. However, since local government has now under the present Constitution been acknowledged as being a level of *government* as opposed to local *authority*, *management*, or *administration*, some fresh ground will probably have to be broken regarding the clear separation of and balance between the legislative, executive and administrative functions of local governments. This, it is submitted, is a significant factor to be taken into account by the Constitutional Assembly in view of the first sentence of Principle XXIV: "A framework for local government powers, functions and structures shall be set out in the Constitution."

Originality of competencies (Principles XVIII 1 and XXIV read with IV and XV)
The full significance of Principles XVIII 1 and XXIV regarding the requirement that the powers and functions of all three levels of government must be provided for in the Constitution, only becomes apparent if read with Principle IV concerning the supremacy of the Constitution.

A constitution can hardly be a constitution if it does not deal with the structures and competencies of the national government, but it is conceivable that a constitution leaves the regulation of provincial and local government to ordinary laws of Parliament. Provision for those matters by ordinary law would have rendered provincial and local government subject to variations in parliamentary sentiments regarding the importance and autonomy of those levels. Such is not to be the case in South Africa.

The *definition* in terms of Principle XVIII 1 of the powers and functions of provincial governments in the supreme Constitution will secure their entrenchment, and therefore also such measure of autonomy from or subordination to the national government as may be provided for in the Constitution. The entrenchment is due to Principle XV, which requires "special procedures requiring special majorities" for the amendment of any of the provisions of the Constitution.

The setting out of a *framework* for local government powers, functions and structures in terms of Principle XXIV is slightly weaker than the "definition" required for the provinces. Nevertheless, it is submitted that the requirement of a constitutional framework cannot be understood to amount to an open-ended constitutional empowerment of Parliament or the provincial legislatures to regulate local government freely. The "framework" is contrasted in the Principle with the setting out in other laws of the *comprehensive* powers, functions and structures. This seems to mean that the Constitution itself should empower local governments in principle to exercise original powers by providing for the nature and general

scope of local government competence, leaving it to Parliament and the provincial legislatures to provide for specific local competencies *on the basis of the Constitutional provisions.* This will require careful consideration by the Constitutional Assembly of the general classes of competencies and the extent of the competence needed by local government in general, and in particular by the different categories of local government (see also Principle XXV).

Having powers allocated *originally* to the provincial government by the Constitution has, in South African law, special significance. This came about through the interpretation by the courts of section 85 of the *South Africa Act* 1909 in terms of which Provincial Councils were empowered to make laws on a listed number of subjects. Thus, in the case of *Bloemfontein Municipality v Bosrand Quarries* 1930 AD 370 at 378 De Villiers CJ said:

> While the Provincial Council, as a legislature, is subordinate to Parliament, it exercises its legislative functions not as an agent or delegate of Parliament, but exercises original jurisdiction deriving its authority as it does from the South Africa Act which has conferred plenary powers of legislation upon it on the subjects mentioned in sec. 85.

Power entrusted originally in a constitution stand in contrast to *delegated* powers. (This distinction was derived from a decision of the Privy Council on a matter originating in Canadian constitutional law - see e.g. *Middelburg Municipality v Gertzen* 1914 AD 544 at 550).

It is suggested that where a Constitution of supreme stature entrusts a specific original competence to a provincial or local government, such originality would, in South African law, have to be recognised as being comprehensive and as unassailable as the Constitution itself. This is reinforced by the supremacy of the Constitution, in contrast to the supremacy of Parliament as was provided for by the *South Africa Act*.

Principles XVIII 2 - "not substantially less than or substantially inferior to"
In order to satisfy Principle XVIII 2, the new Constitution will have to allocate competencies to the provinces which are *substantially* neither quantitatively less nor qualitatively inferior "to those provided for" in the present Constitution.

The point of departure is therefore *all* provisions of the Constitution that "provide for" provincial competencies. Most of those are to be gleaned from sections 125-162 and Schedule 6, but other provisions such as sections 61, 62, 105, 114, 200, 213 and 219 will certainly also have to be taken into account.

What would amount to a *substantial* reduction of the quantity or quality of those competencies, can hardly be determined in the abstract. It is submitted that, in the context, the word "substantial" means that the provincial competencies of the new Constitution need not be exactly the same as those of the present Constitution, but that the provinces should be left in at least the same position of relative competence regarding the national government as they can be now. Thus a provision requiring provincial laws to be submitted for approval to the President

(instead of the Premier), would, it is suggested, amount to a substantial qualitative reduction, whereas dealing with "animal control and diseases" as a component of the functional area of "agriculture" would hardly qualify as a reduction of the quantity of provincial competencies.

It should be noted that the provincial powers and functions concerned are not only those that will have been taken up and are actually exercised by the provinces at the time of the replacement of the present Constitution, but all those presently "provided for", i.e. also those that may potentially accrue to a province through the adoption of laws falling within the ambit of a functional area mentioned in Schedule 6.

Principle XIX - "exclusive and concurrent powers", agency and delegation
Principle XIX states that national and provincial governments have to be endowed with both exclusive and concurrent powers (compare also Principles XXI 6 and 7, XXII and XXIII). Whether section 126 of the present Constitution (in which the terms "exclusive" and "concurrent" are not employed and from which the expression "concurrent" was removed by amendment) would, if retained in the new constitutional text, satisfy the relevant Principles, is worth while to consider.

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, that 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 insofar as it passes laws within the prescribed limitations, and Parliament also has exclusive competence regarding all other matters in terms of section 37. It is therefore submitted that the wording of section 126 is an example of a formulation that could satisfy the requirements of the Principles.

As a matter of constitution-writing policy, it is suggested that it would be wise to avoid the grave risks of confusing the issue by employing "exclusive" and "concurrent" as terminological labels, the definition of which may perpetually be the subject of controversy.

The "power to perform functions for other levels of government on an *agency* basis" involves the appointment of one government as the agent (representative) of the other to perform a function of the latter in terms of a mutual agreement. In principle a government of any level can be empowered to appoint a government of any other level as its agent, but mutual agreement to such appointment is required. Agency is usually dealt with as a contractual matter. There is however no reason why inter-governmental agency cannot be regulated constitutionally. It is indeed submitted that Principle XIX should encourage the framing of clear guidelines in the Constitution for the implementation of inter-governmental agency.

Delegation of functions is normally conceived of as "downward" empowerment. Although Principle XIX seems to be cast in broad enough language to allow for the delegation of functions by a provincial government to the national government,

perhaps regarding a matter in the exclusive domain of the province, it is submitted that such "upward" delegation would be a novel form of delegation. Delegation should preferably also be the subject of clear constitutional regulation, since the Principle would appear to go beyond the scope of the usual forms of administrative delegation.

Principles XX and XXI - Criteria for the allocation of powers

In addition to the requirements of financial viability and effectiveness already mentioned, Principle XX requires the allocation of powers to be made on a basis "which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity." This conglomeration of criteria, it is submitted, does not provide positive indicators for the formulation of the relevant constitutional provisions. They will however have to be satisfied negatively, in that the text that emerges, must not have the effect of undermining national unity, detract from the autonomy of the provinces or disregard cultural diversity. "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.

Principle XXI is the equivalent of the provisions contained in subsections (2), (3) and (4) of section 126 of the present Constitution. Its wording however provides some significant scope for the improvement of section 126. The most compact format in which the application of the prescribed criteria can be demonstrated in conjunction with some other relevant Principles, is a draft text.

What follows is offered merely as a demonstration, developed for the purposes of discussing the application of Principle XXI and some of the related Principles. It shows some possible approaches to the regulation of matters currently dealt with in sections 125 and 126 in accordance with the Constitutional Principles. The relevant Principles are indicated in brackets.

Legislative authority of provinces

125. (1) There shall be a legislature in each province. **(XX)**

(2) The legislative power of a province vests, subject to this Constitution, in the provincial legislature, which is competent to make laws for the province in accordance with this Constitution. **(XX, IV)**

(3) Laws made by a provincial legislature shall apply only within the territory of the province. **(XXI 2 "action taken by one province which is prejudicial to the interests of another province or the country as a whole")**

(4) For the purposes of mutual co-operation **(XXI 7, X "national unity")** or to guarantee equality of opportunity or access to a government service both Parliament and a provincial legislature is competent, subject to section 126, to make laws for the province with regard to all matters falling within the functional areas specified in Schedule Z. **(XIX - concurrency)**

(5) The legislative competence of a province includes the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence. **(XXI 8)**

(6) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which a provincial law does not prevail over an Act of Parliament in terms of subsection (1) of section 126.

(7) A provincial legislature may, within the framework of an Act of Parliament, make laws concerning the performance of functions of the national government which have been delegated to the provincial government or for which the provincial government may act as an agent for the national government in terms of an Act of Parliament. **(XIX "agency of delegation")**

Prevalence of provincial laws

126. (1) A law passed by a provincial legislature in terms of this Constitution, shall prevail over an Act of Parliament which deals with a matter referred to in subsections (4) and (5) of section 125, **(XIX exclusiveness)** except insofar as —

(a) it is essential that the Republic should attain specific national goals in its international relations regarding such matter and the Act of Parliament provides therefor; **(XXI 3)**

(b) the matter is regulated effectively by the Act of Parliament regarding the quality and rendering of services and cannot be regulated effectively by provincial legislation; **(XXI 1)**

(c) essential uniform, generally applicable norms or standards for the whole of the Republic concerning the management or administration of the matter or of a related function are necessary, are not provided for by the provincial law and are provided for by the Act of Parliament; **(XXI 4)**

(d) minimum standards for the rendering of public services are necessary regarding the matter, they are not provided for by the provincial law and are provided for by the Act of Parliament; **(XXI 2)**

(e) the Act of Parliament —

(i) provides effectively for the maintenance of the unity of the national economy; **(XXI 2)**

(ii) is necessary to protect the environment across provincial boundaries; **(XXI 2)**

(iii) promotes interprovincial commerce; **(XXI 5)**

(iv) ensures the mobility of goods, services, capital and labour across provincial boundaries, **(XXI 5)** or

(v) is essential to protect the national security, **(XXI 2)** and provincial legislation does not do so; or

(f) the provincial law unreasonably prejudices the national economy, the health of the community or the security of the

Republic. **(XXI 2)**

(2) An Act of Parliament shall prevail over a provincial law as provided for in subsection (1) only if it applies uniformly in all parts of the Republic. **(XIII 2, XXI 4)**

(3) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that they are, expressly or by necessary implication, inconsistent with each other. **(XX - "promotes national unity and legitimate provincial autonomy")**

(4) An Act of Parliament shall prevail over a provincial law only if it is not possible for the Constitutional Court to resolve a dispute in this regard by means of a reasonable interpretation of subsection (4) of section 125. **(XXIII)**

(5) An Act of Parliament is invalid insofar as it purports to cause or empower an encroachment upon the geographical, functional or institutional integrity of a province. **(XXII)**

Francois Venter
22 March 1995

CONSTITUTIONAL ASSEMBLY

QUESTIONS OF CLARITY REFERRING TO

This is the one item which was not on the agenda but under general. The Core Group had a request last week that we continue the debate on the Constitutional Principles. Some of the members wanted to raise further issues but we ran out of time last week. So we will now continue the debate on the Constitutional Principles.

Q

Mr Smith *Chair, I think perhaps one of the issues we would all be interested in, is Principle XVIII(2) particularly if we don't mind personalising it slightly, in the light of certain proposals being made from the opposite side, and I wonder if the experts have had an opinion or perhaps ANC members themselves can perhaps express an opinion on the reversal, the rephrasing of section 126 to give national government the legislation pre-eminence over provincial, and I'd be interested in hearing what you have to say on that issue, as one issue to table for discussion.*

Chairperson So you are putting the question to the ANC Mr Smith do you want an answer from the Technical Committee or from the ANC?

Q

Mr Smith *Well Chair, it flows from Prof Venter's paper the whole issue of section 126 and read in conjunction with Principle XVII(2), so I think we have an interesting, real-life scenario before us, and I'm just inviting comment. It's a good example to discuss in the light of the Constitutional Principles, the kinds of problems we are going to have when we start putting proposals forward, because the whole issue of these principles is a test of constitutionality and I think inviting comment from the experts on the example that's before us.*

Prof Venter Madame Chair, I think the safest thing for me at this stage to say is to refer you to page 5 of that submission where I think the core of the whole matter, well I attempted to put concisely the core of the whole matter, it is in the last paragraph where I submitted that in the context the word *'substantial'* means that the provincial competencies of the new Constitution need not be exactly the same as those of the present Constitution but that the provinces should be left in at least the same position of relative competence regarding the national government as they can be now. What followed was the statement that this is very difficult to assess in the abstract and I think it still has to be assessed in the abstract. It will

eventually be for the Constitutional Court to consider the precise terms of a new Constitutional text to determine whether the provinces are at least in the same position of relative competence; and I really think at this stage it is a matter of political debate to determine whether the position will be still relatively the same as it is at the moment, if you diminish either the legislative or executive powers of the provinces. I think it would not be healthy for me at this stage to comment directly on what the ANC proposes because I don't exactly know in precise terms.

Q
Mr Smith

Maybe I could follow up with being less precise because it's perhaps unfair, but when we talk about the provinces not being in a relatively worse position, can that be taken to mean a province individually as apposed to an agglomeration of provinces exercising common powers?

Prof. Venter

For that Madame Chair one should look I think at the precise words of Principle XVIII(2) which says the *powers and functions of the provinces defined in the Constitution* including some other things, should not be substantially less than or substantially inferior to. That refers to the provinces as a level of government as a Constitutional institution. It is not aimed at safeguarding a specific province, and I would be careful in concluding from the wording there that it would mean that the provinces could for example on a voluntary basis agree to a reduction or an increase of their powers and competencies.

Q
Prof Du Toit

Thank you Chair. I want to ask this question in this regard to the Constitutional Experts, the fact that we have in schedule 4 Principles and not clauses of law, does that make a difference in the way you suspect the Constitutional Court will interpret it, in the sense that principles are guides? Would that make an affect, would that have any effect, do you suspect it would be interpreted in the light of political realities or would it receive a normal strict interpretation as we normally interpret our laws generally ?

Prof Venter

Madame chair, that question I did try to address in the first part of my presentation last week where I tried to indicate that it would be inevitable for the Constitutional Court to read the Constitutional Principles as principles underlying the new Constitutional text as a foundation and that they would have to be read in conjunction with each other as a whole, with an internal consistency. That I think would be the approach that a normal court of law would follow. Obviously that means that the principles are not and cannot be considered to be provisions of a Constitutions substantive provisions and the

wording of the principles need not be reflected exactly in the Constitution, but the Constitutional Court will have to give effect as to the meaning as it primarily emerges from the words that are used in the Constitutional Principles. It's on that basis that I am saying that for example principle XVIII(2) can hardly be read differently when focusing on the provincial system as a whole. Political reality and reality in general, will naturally also influence the Constitutional Court. The Constitutional Court won't be able to deal with these matters as an academic abstract thing that can apply in any specific country, but one must also be careful not to consider political realities to include the trend that might be defined from the elections and so on, as to the political preferences as such. The political reality in the sense of how the provincial system has evolved, how the whole system was devised in the present Constitution, how it is being established and how it is evolving at this stage certainly, I'm sure that those are things we will have to take into consideration.

Q

Dr Rabinowitz *Madame Chair, to the experts and to Prof Du Toit perhaps, there was quite a lot of discussion last time about this overwhelming majority giving rise to a change in interpretation of the Constitutional Principles, not even change in interpretation but almost like a rejection of the Constitution Principles on the grounds that an overwhelming majority might support such a change; but now, overwhelming majority meaning what? We can't continue to slip around this. One assumes, or if one can read overwhelming majority, one has to decide is this by referendum. Is this by the majority of the Constitutional Assembly? Is this by the majority of provinces? Because for example, say the Western Cape and KwaZulu-Natal don't accept what the other provinces do accept or what is known as the overwhelming majority do accept, how does one decide whether their views should be taken on board or not? I'm just looking for a degree of clarity in your interpretation of overwhelming majority.*

Prof Venter Madame Chair I think the answer to that is quite brief and that is that the Constitutional Court is a court of law which is required by the Constitution to interpret the Constitutional Principles as legal guidelines for the drafting of the new Constitution. The Constitutional Court is not called upon to interpret the outcome of any election.

Q

Mr Gordhan *Chair, again with reference to principle XVIII(2) and perhaps picking up Mr Smith's point in a very indirect way, what does substantially less and substantially inferior refer to? Does it refer to the number of functional areas in powers? Does it*

refer to the kind of functional areas in powers? Does it refer to the collective functional areas, in other words collectively "weigh" the same or not? Prof Davis last week used the concept of elasticity, what elasticity is there in that interpretation?

Prof Venter

Again Madame Chair, I can do no better than what I also said last time and repeat just now, substantially, not substantially less refers to on the face of the meaning of those words, to quantity. It's not supposed to be quantitatively or substantially less and substantially inferior refers to quality. In other words the substantial quality of the competencies of the provinces should not be reduced. Now having said that it does not mean that the powers and functions and competencies of the provinces must be exactly the same as they are in the present Constitution, but looking at the whole as it emerges from a new Constitutional text, it will have to be considered by the Constitutional Court, in the first place by the Constitutional Assembly and then by the Constitutional Court, whether the qualitative and quantitative picture that emerges regarding the position of the provinces is substantially less or relative to the national government's powers and functions in a general area similar to what they are right now. To be more precise than that at this stage I don't really think is possible until one has a concrete text to consider. At this stage it is only possible, I think, to consider the extremes, taking away all competencies regarding education from the provinces would be an obvious substantial reduction, to take an extreme example, whereas it would be an unwarranted extinction or an extinction not required by the Constitutional Principles, if the provinces were given powers to deal with everything dealing with police and taking it away from the national level as examples of the extremes, but, to be more precise, I don't think that is possible right now.

Q

Mr Gordhan

The question is, following on what Prof Venter just said, if we take away all the powers as an IFP majority government in the national level from a particular province in respect of education, but replace it with provincial powers on defence for example, does that change the picture in any way?

The second question is, does provincial powers in respect of executive or legislative issues, have to reside necessarily within the provincial domain, what if that configuration is changed and provinces are given some power at a national level, what happens then?

Prof Venter

I'm not sure if I understood the first question correctly but if I

can interpret it, I don't think it's merely a question of exchanging different functional areas and swapping them around because it could be argued for example if all competencies regarding education are taken away, never mind with what it is being replaced, that could go contrary to the Constitutional Principle. That could be considered to be a substantial diminution of something which the provinces are involved in right now, very fundamentally. Regarding the interchange or exchange of legislative and executive powers and functions, I think this is an area of risk. If it is to be argued that the one is to be increased substantially the other one diminishes substantially; that would depend, I think, very much exactly on how it is done, but in principle I consider it to be an area of constitutional risk. What I intend to say by that is, that it's not obvious that that would be in order in terms of the Constitutional Principles. As a matter of fact I think there might very strong arguments to say that the Constitutional Principles require local government and provincial government to have both legislative and executive powers. I'm not sure if I understood the questions correctly.

Prof Majola On the question of what would be the position, if for instance education powers are taken away and replaced with defence powers. I think that would amount to a substantial reduction, and I'm saying this solely because powers are given to levels of government for particular purposes, and I think that already now the powers of education have been given to provinces because there is a particular need that they have to satisfy there, and if you are going to take them away and give defence powers to provinces who really do not need to use those powers. I think you would be substantially reducing the powers of the province.

Q
Dr Geldenhuys *Chairman, I just want to react to a remark made by you when you were not in the chair, you pointed out that perhaps principles and norms are more or less on the same level, now I just want to point out in my view, I think a principle is much stronger than a norm, it's a fixed point of departure from which you cannot deviate, what their legal status are going to be, that I cannot comment on, but I just want to point out I think a principle is stronger than a norm.*

Q
Mr Carrim *Comrade chair, I'm covered in a sense, I was going to pose the same question as Pravin Gordhan was, in a different way slightly about the "weight" one attaches to legislative vs executive powers and how that balances against Principle XVIII(2), but the other question that I just wanted to pose was, let's assume that a province decides on a Provincial*

Constitution it's shaped a Provincial Constitution by November this year and I understand presumably that that Provincial Constitution has to meet with the two thirds majority in the legislature of the province and then it submits that Constitution to the Constitutional Court, which then certifies the Constitution as acceptable if it meets with the Constitutional Principles, the 34 that are in the interim Constitution but what happens if in the meanwhile the Constitutional Assembly agrees by a two thirds majority on a very different "weighting" or a different form of the weighting of powers between province and central state? What would happen to that Provincial Constitution? It would meet the interim Constitutional requirements but it may not meet the requirements of the new Constitution which might have a different configuration of provincial and central powers, how valid would such a Provincial Constitution be?
Am I being clear enough?

Prof Venter

Can I also, just before I reply to the question on the Provincial Constitution, refer to the first part of the question, I might have pointed out in replying to Mr Gordhan's question that Principle XX very specifically says *'that each level of government shall have appropriate and adequate legislative and executive powers and functions, powers that will enable each level to function effectively'.* That is an indication that both elements of the normal governmental powers, competencies need to be provided for. If a provincial legislature were to adopt a Constitution now it must conform to the Constitutional Principles, it's got to be certified as conforming to the Constitutional Principles and it may not run contrary to the present Constitution except insofar as it provides for legislative and executive structures and procedures. That it can do. I do think that there is a limitation on that also in that the general tenor of the Constitutional Principles will also have to be satisfied, those of accountability, of affordability, of effectiveness and so on.

Now the new Constitutional text being drafted by the Constitutional Assembly must also conform to the Constitutional Principles and much of the Constitutional Principles will have to be concretized in the new Constitutional text. That really causes ...., or let me put it this way, it really limits the possibilities of a conflict between a Provincial Constitution adopted before the new Constitutional text is adopted because they have both to conform to the same basic set of principles, but should there be some element in the new Constitutional text which conforms to the Constitutional Principles which clashes with a Constitution of a province adopted in the meantime, then the Provincial Constitution will

have to be changed, because Provincial Constitutions will in perpetuity have to conform with the National Constitution, one can almost call it the natural way of things in composite states such as the one we have.

Q

Sen Bhabha *Does the creation of further checks and balances on the provincial legislature, can it necessarily be interpreted as lessening the powers and functions of second tier government.?*

Prof Venter Madame Chair, I think the answer is no. A further separation of the legislative and executive functions I think is actually required by the Constitutional Principles, specifically Principle VI. That does not reflect on the quality or the quantity of the functions of the competencies of any level of government. It deals with structures. Checks and balances do not reduce the total of competencies, it builds in a mechanism for dealing with the way in which these competencies are to be exercised, so the short answer is no.

Q

Mr Smith *Thank you Chair, I was going to ask and perhaps any of the panel who know the answer might answer. Is there any obligation on the Constitutional Court when certifying a number of Constitutions, because we could have up to ten Constitutions coming through from now on, is there any obligation for them to certify them in the order in which they are received?*

Prof Venter I would say no, I don't know if my colleagues would agree.

Q

Mr Smith *Could they deliberately stall the certification of the Constitution without sufficient grounds?*

Prof Majola I think that's a serious indictment of the court. No I don't think so, I don't think it would ever happen. I think the whole operations in a court of law is dictated by the workload, the technicalities and so on, I don't think they would.

Q

Mr Smith *So essentially, first come, first served?*

Prof Majola Well, I don't think so, I think the case that is ready to be taken on it gets taken.

Q

Mr Leeuw *Thank you Madame Chair, my question is very simple. Understanding that the Principles are rigid how does one amend the Principles?*

Prof Majola I think that you cannot amend the Principles.

Q

Dr Rabinowitz *I wasn't going to say this Madame Chair, but I'm guessing, I'm sure you said you can do what you like with them they open to such slippery interpretation, but that was just venturing again. My question was in relation to what Mr Gordhan said, with taking away legislative powers from the provinces and compensating for it by giving greater power to the centre, in other words to the Senate, now that may be theoretically seen as strengthening the provinces in one respect, but if one looks at it now in the way that the ANC always invites us look at it in the South African context, that in effect would not be granting any more powers to the provinces because the Senate operates largely representing parties rather than provinces, so how would that be interpreted do you think, by the court.?*

Prof Basson I won't venture an answer because I've read the ANC's proposal on the Senate and I don't think it would be correct to give a straight answer on that, but I think if I can venture a view on Principle XXVIII(2), it doesn't say that the powers must not be less or inferior to those provided for in this Constitution, it says *substantially less* or *substantially more*. I would say the word *substantially* denotes a certain discretion and it makes it very uncertain this whole Principle , many of the Principles are more certain and capable of interpretation, but XXVIII(2) it's more or less qualitative or as Francois said, quantitative evaluation. I would say it's collective, in the end it would be a collective evaluation of whether the powers of the provinces are less or more. So the question you are asking whether you can exchange the two, the one for the Senate, I would say on the Senate specifically, it depends of course on how the Senate is composed. The Senate can be composed in a manner such as the present Senate where the senators are I would say, primarily the representatives of the political parties. One could also change the composition or the structure of the Senate to make the senators more the representatives of the different provinces, but I wouldn't like to directly answer the question whether this would qualitatively be the same powers as those that are presently residing with the provinces.

Prof Venter Without making any political comments I do think that the Constitutional Assembly in discussing these matters will have to consider a question and that is whether the extension increase of the functions of the Senate at the national level has to do directly with the position of the provinces as is intended in principle, well various principles, but amongst others Principle XVIII and Principle XX, whether a change, if it is a

change at the national level, and the level of the functions of parliament reflects directly on the position, the constitutional position of the provinces as such, in terms of the principles, I wouldn't like to go further than that.

Q

Dr King *I just want to make quite sure, Professor Basson mentioned it now and he mentioned it before as well, there was a reference, it was referred to before by I am not sure who it was, but again now by Professor Basson, not substantially less or more, I don't think more comes into the picture at all. It says, 'the powers and functions of the provinces as defined in the Constitution including the competence ...., shall not be substantially less than or substantially inferior to', but there is nothing about more, so it could be more. We could actually increase the powers of the province.*

Prof Venter I am sorry that I misled but I do agree with your interpretation.

Q

Mr Gordhan *The question is whether a view which says that residual power should reside in the province is contrary to this Constitutional Principle under discussion?*

Prof Venter I think the question requires elucidation. It depends on what is meant by residual powers.

Q

Mr Gordhan *No, all the residual powers in terms of this Constitution in the current situation reside with the national. If a party puts forward a view, and there is no secret who does that, the residual powers should reside now with the provinces, is that contrary to this Constitutional Principle?*

Prof Venter I think that would mean that the legislative and executive powers of the provinces would be extended, enlarged, and that does not run contrary to the Constitutional Principles. But the difficulty in such a case would be to determine whether the balance, let me put it this way, the difficulty would be to determine whether the position of the Constitutional Principles, I am sorry this is very complicated, let me formulate it once again. The fact is that the Constitutional Principles do not deal with the question of, specifically does not deal with the question of residuary powers. The closest it comes to it is in Principle XXIII where it says that 'in the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to both and it cannot be resolved, then it will rest with the national government,' but that doesn't really deal with the essential question of residual power. Again I think the answer will have to be found in an interpretation of the whole of the text presented to the Constitutional Court.

Q
Mr Gordhan *Having regard to the whole of the Constitutional Principles, if there is a substantial diminution of national powers, would that be contrary to the Constitutional Principles?*

Prof Venter It doesn't seem to me to be the case. I don't know what my colleagues might want to add to that.

Prof Majola I just want to confirm that is how I see the position, but of course I think one has to consider what powers of the National Assembly are being taken away, because you may erode them so much that it could be contrary to the Constitution.

Q
Mr Gordhan *Can I just comment on the same question, if Professor Majola says, with your permission Chair, that if depending on what power you take away it could be contrary, in terms of what provision?*

Prof Venter I am not quite sure if I understand the question correctly, but the Constitutional Principles require the government shall be structured at national, provincial and local levels, now that can theoretically be stretched so far, or the reduction of national powers could be stretched so far that one could say that we haven't got a sovereign, one single sovereign state any more and that there is no real national government, that's very theoretical. I think what it does indicate is that there is quite a large measure of leeway, and it's in any case a very unlikely scenario.

? (ANC) I just want clarity because Mr Gordhan's question was to what extent would the reduction of national powers conflict with the Constitution. Now the response is whether that would be Constitutional or not. The response was that that will not be negating the Constitution in any way, but again this Constitutional Principle XXIII actually contradicts what the Technical Experts are saying here in terms of where the power ultimately resides.

Q
Mr Smith *Surely Principle XX covers Pravin's point?*

Prof Venter Perhaps I should clarify Principle XXIII. I think Principle XXIII has a very limited application because ...(intervention) (.... CP XIII? No, no, that deals with traditional leadership).
Principle XXIII, "in the event of a dispute concerning legislative powers allocated by the Constitution concurrently to the national government", is that the one that was intended? If that was the case Madame Chair. That principle follows on a whole number of principles dealing with the allocation, the

distribution of competencies between national and provincial levels of government, and it turns out, I think, that what it says in any situation a dispute is not really pertinently covered by the provisions of the new Constitutional text where it's impossible for a court of law to determine what the position is, whether it should reside with the national or the provincial government, then the balance should fall to the national government. But it is limited to a situation where the Constitution does not appropriately deal with the problem.

Q
Chairperson

Prof Venter if I can just ask, if now say there is agreement that for the final Constitution we agree that we list the powers of provinces, does it not follow automatically then that those powers not listed becomes residual powers for national? I am asking this because in our submissions we are asked to list whether your party agreed to list the national or the provincial. If we agree that we list only the provincial powers, will that be in contradiction with any Constitutional Principle?

Prof Venter

If only the provincial powers are listed that would be in conformity with the present position of the present Constitutional text, and that is one element of the determination of the quantity and quality, Principle XVIII(2), so that shouldn't run contrary I think to any Constitutional Principle. Does that answer the question?

Prof Basson

I just want to add on Mr Gordhan's question about the national powers. I think we shouldn't forget Principle XXI which provides on certain grounds for the override of the national power or the central government, therefore I wouldn't think one could diminish the central government to such an extent that it would infringe upon those overrides contained in Principle XXI.

Q
Sen Bhabha

I am coming back to Principle XX, the use of the word appropriate and adequate legislative and executive powers in the light or to be consistent with the use of the word later, in the principle national unity. Now what meaning would you attach to the word 'appropriate and adequate legislative authority' in Principle XX bearing in mind the word national unity is used later in the principle. Could you give us a commentary on that please?

Prof Venter

Could I refer you to the presentation last week, at the bottom of page 6, and the top of page 7, and just add to that in general that the appropriateness and adequacy of the allocation is focused on something specific namely that each level of government needs to be enabled to function effectively. Now

those are very general terms, that's why I mentioned at the top of page seven, that this is a conglomeration of criteria which does not provide positive indicators for the formulation of the relevant constitutional provisions, but what it does do is to make it clear that each level of government, national, provincial and local must have legislative and executive powers. Which executive and legislative powers are allocated need then to be judged against the background of enabling those kind governments to function effectively.

Mr Smith *Professor Basson made reference to overrides in Principle XXI, I am not sure that I can see any, but I see criteria for the allocation of powers, but I think from that one form of concurrence could be overrides, but unless it's a slip of the tongue, unless he believes and perhaps I am asking through you, does Professor Basson believe that Principle XXI actually provides for overrides clearly?*

Prof Basson I think what I was trying to say is that to provide for overrides would not be inconsistent with the Constitutional Principles.

Prof Venter If I might add in the draft that I presented at the end of my little paper last week, I try to indicate that Principle XXI really does require what is popularly called overrides, but there are different ways in which it can be formulated, and the one I formulated there is one specific approach. To my mind that formulation will satisfy the requirements of Principle XXI.

Q Sen Bhabha *Principle XXI(2) says, "where it is necessary for the maintenance of essential national standards .... " etc, may I ask who establishes the national standards?*

The provinces!

.... general laughter.

Q Sen Bhabha *Who establishes those national standards because that seems to be the sine qua non for national overrides?*

Prof Venter The material we discussed earlier on in the framework that we have been working on this afternoon, would be at the starting point, to decide really what the essential national standards are would, I think, primarily be a matter of sorting it out inter-governmentally, and only in the event of that not being possible, where a deadlock situation is reached, it would have to be presented to a court of law, the Constitutional Court. Then the Constitutional Court will have the very difficult task to try to establish objectively, what essential national standards

are, and courts of law are quite good doing that, to applying objective standards to a set of facts. But that would be the final solution.

Q
Mr Smith

I think the feeling we all have obviously is that within the parameters of the principles there are various options available to us, that we discount the extremes, there is core to the centre that ranges from mid centre to mid left, and we are very middle of the road when it comes to this sort of thing (laughter). I was going to ask, Prof Venter for example has got a reformulation of schedules of 126 and he does admit there are a variety of reformulations that could take place. I think what would be quite interesting would be to see some other formulations that you believe, as a group of experts, that comply with the principles but are deliberately taken to the extremes that you can create on both sides. It would be an interesting exercise for us, because then we can use that to judge the highest entire set of principles for the internal coherence of the principles that we are all talking about, but we can't really get a handle on.

Prof Venter

If I can just say that that would be an exhausting task to undertake to try to draft every possibility but it might be a good idea if one of my colleagues were to draft something as a different approach.

Q
Sen Rabinowitz

Could one perhaps look at it particularly from the point of view of structuring that in terms of framework legislation, various types of framework legislation? Framework legislation which provides for norms and standards, and a framework legislation which provides for general principles and for coordinating principles?

Q
Mr Gordhan

I want to agree with Mr Smith that it would be very useful to have other samples, but the question I was going to ask the first one was, if Professor Venter's draft, or redraft from 126 is an example of an override, one would like to know what are the other types of overrides, and I think it would be very informative for all of us to have that and if we have three or four examples of that it will be very good.

But the second one relates to Principle XXI again. Surely it is within the prerogative of national government, for example in housing, to say that it is setting aside X amount of the fiscus for housing subsidies, and therefore the use of those subsidies, this is the standard, ie anybody earning less than R500,00 gets this, Anybody earning less than a R1 000,00 gets that and so on, and that becomes a national standards, and it legislates on that basis. I am just using one example, there are other

examples of national standards as well. Now that's surely not a matter which must be determined inter-governmentally? There can be consultation inter-governmentally, but ultimately national government has the right to legislate on that matter, true not true?

Prof Venter

Madame Chair the eventual test for the constitutionality of the laying down at a national level of national standards would, in the first place, have to be whether they are essential and whether they are reasonable, I would also submit. Should somebody, it doesn't matter whether it is a provincial government or for example a local government, or even possibly an individual, argue before the Constitutional Court that a piece of national legislation laying down national standards is not reasonable in the framework of the Constitution, that would be an argument that the Court will have to consider. I think the principle where it allows for national legislation to lay down national standards does not give an unqualified legislative competence to Parliament as it chooses. It will have to be balanced in the context of the whole Constitution and in the context of the structure of government and the allocation of powers at national and provincial level. If it, for example, had the effect of excluding all possible intervention, legislatively and executively of provincial governments, I think it would be arguable that that would not be a reasonable national standard. On the other hand it can't be limited to such an extent that Parliament is powerless to legislate sensibly for objectively required standards which can be justified in the circumstances of the time.

Q

Chairperson

I just have got one last question, just for information. Professor Majola mentioned that by 1 November the provinces must have completed their own Provincial Constitutions, I want to know if anybody is aware there are processes currently in the provinces, are they busy writing their Constitutions? Because at the end of the day you also said that they must conform to the Constitutional Principles, they must conform to the national Constitution, and I can't remember that I have read anywhere about any province who is busy actually writing their own Provincial Constitutions and how are they doing it. It's just for my own information.

Prof Du Toit

Natal has given it up.

Q

Chairperson

Are you aware of any province who is busy writing the final, the Provincial Constitutions?

Prof Majola Madame Chair just a slight correction I don't think that the comment came from me, but I am not aware of any province that is busy with their Constitution.
Just to get back to the question by Mr Gordhan, I think it's an interesting question about national standards. I am thinking of a situation where provinces might face a minimum wage at about R50,00 an hour, and then the national government comes and sets a national standard of R35,00 an hour you see, and whether the national government can then say this is in the national interests, we are setting a national standard. Obviously it would have to show that it is necessary in the national interests, but the provinces might win the case by showing that they have put up or adopted an even better standard than that, which would then mean therefore that the national government would be told to stop its Act, to withdraw its Act.

Q
Mr Smith *What is the difference between a norm and standard?*

Q
Mr Cronje *Go and read a good book, there are plenty of good books on the matter. The example that the Professor has given on who is the onus to show that it has complied with the standard? Is it on the province, or is the onus on the national government now to say that you have not complied, in the example that has been given?*

Prof Majola I don't get the question very clearly, obviously the national government cannot be the judge in its own case here, because I think the whole principle is couched in some kind of objective fashion and I would like Prof Venter, that you would have to have an independent body to decide whether the national standard was necessary or not. I think the principle says that the national government can intervene only when it is necessary to set the national standard. I don't think the whole question relates to the compliance with the national standard, I think it relates to the setting of the national standard.

Prof Venter The question of onus I think, would really only come up when the matter goes to court, because the question will then be, is this Act of Parliament constitutional or not, and then it, I think procedurally, normally, one would expect that the party who avers that the law is not constitutional would have to prove it. The primary onus would probably be on that party.

Mr Cronje *Before you close, on the facts of question of writing of constitutions, Natal have actually started the process by having now a Parliamentary Constitutional Committee, and they are now at the stage of looking at the programme and what, what, so they are doing it.*