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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

SUMMARY

AREAS OF AGREEMENT & CONTENTION:

NATIONAL & PROVINCIAL LEGISLATIVE & EXECUTIVE COMPETENCIES

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COMMISSION ON PROVINCIAL GOVERNMENT RECOMMENDATIONS

15 JUNE 1995

Embargoed until 14h00 15/6/95

REPORT THEME COMMITTEE 3
SUMMARY: AREAS OF AGREEMENT & CONTENTION:
NATIONAL & PROVINCIAL LEGISLATIVE & EXECUTIVE COMPETENCIES

PART I : GENERAL PRINCIPLES

1. This section deals only with the approach of the various parties to the applicable Constitutional Principles. The details of the analysis of party proposals are attached in Part II.

Constitutional issues	Agreement	Contention	Further clarity
<p>1. The existence of exclusive & concurrent powers.</p>	<p>There is agreement amongst all parties that there should be powers allocated to both national & provincial governments.</p>	<p>1. Where the residual powers of government lie. In other words for the ANC, NP & PAC residual power lies with the national entity, for the IFP & DP (ACDP?) residual power lies with the provinces.</p>	<p>1. Not all parties have expressed a view as to whether specific powers of provinces & of national government shall be listed expressly in the Constitution.</p>
<p>2. Role of framework legislation to be passed by central government.</p>	<p>There is agreement that national government should be empowered to pass framework legislation within which the provinces are then entitled to implement detail within the context of the framework provided by the said legislation.</p>		<p>1. Not all parties have expressed a view about framework legislation & functions. 2. The exact role to be fulfilled by framework legislation and under what circumstances.</p>
<p>3. The prevalence of powers of central government.</p>	<p>1. The principle of an override power to be exercised by the national parliament is accepted.</p>	<p>1. There is dispute as to the extent & ambit of the override. 2. There is a dispute as to the presumption that the legislature of central government prevails over that of provincial government if the requirements of the override have been met (or vice versa).</p>	<p>1. Certain parties have not made clear as to whether the Bill of Rights overrides legislation which is in conflict therewith. 2. What is still in dispute is the extent an override power is to be exercised.</p>

<p>4. Should the competencies of the provinces be fixed by the Constitution or should the Constitution allow for an evolutionary process?</p>	<p>Where parties have addressed the question directly, there is agreement that the power should be evolutionary.</p>		<ol style="list-style-type: none"> 1. The definition of evolutionary. 2. For the ANC evolutionary appears to mean that the vertical division of competence should not be rigid. The concept of framework legislation can be used to extend the legislative activity of provinces. 3. For the NP the principle of evolution is linked to the principle of asymmetry namely that provinces will be obliged to assume certain of the powers certified in the Constitution but can take them up upon decision by such province at a later stage. 4. The PAC considers that the list of provincial powers should be fixed in the Constitution. However, the question of whether a province can take up these powers on an evolutionary basis has not been dealt with expressly. 5. The DP considers that lists of national & provincial powers should be fixed in the Constitution. However, provinces should be able to take up their powers on an evolutionary basis. 6. Certain parties have not addressed this question at all. 7. Certain parties (IFP) need to address the matter expressly.
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<p>5. Executive competence of the provinces.</p>	<p>Provinces should be granted executive competency.</p>		<p>The detail of how & where such competence should be specified remain to be canvassed. Should there be extensive executive competence without legislative competence? Some parties have not addressed the matter directly.</p>
<p>6. Alternative mechanisms for safeguarding interests of provinces.</p>	<p>There is agreement between the ANC, NP, IFP & DP that the Senate constitutes a body capable of representing provincial interests in national lawmaking.</p>		<ol style="list-style-type: none"> 1. Liaison with TC2 which is also studying the Senate should be instituted as a matter of urgency to bring clarity to the role & composition of the Senate. 2. More detail is required on the role of other inter-governmental institutions which might be utilised in reconciling the powers of the provinces with the national government. 3. Certain parties to express their views more clearly (IFP).
<p>7. The manner in which the Constitution would deal with local government. In particular the question arises as to the distribution of competencies between national & provincial levels of government as far as local government is concerned.</p>	<p>The promotion of maximum participation in democratic & accountable government at local level should be encouraged.</p>		<ol style="list-style-type: none"> 1. Although there is a difference in certain of the proposals which dealt with local government specifically, namely as to whether local government should be entirely regulated by means of provincial constitutions & legislation, the matter was not canvassed by all the parties. 2. Should central or provincial government have a supervisory role over local government?

8. Asymmetry as a Constitutional Principle governing the allocation of power.

1. There is a need for all parties to define exactly what they mean when they apply this term.
2. Certain parties have not dealt with the matter expressly (ANC & PAC).

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PART II : DETAILED ANALYSIS OF PARTY PROPOSALS

Constitutional issues	Agreement	Contention	Further clarity
1. Residual legislative power.	The level where the seat of residual power is vested is usually the level which is more powerful. The ANC, NP & PAC agree that the national competency should be unallocated & the IFP & DP agree that the provincial competency should be unallocated.	The ANC, NP & PAC believe that the national competency should be unallocated (residual). The IFP & DP (on the other hand) believe that the provincial powers should be unallocated (residual) power.	

2. The existence of exclusive & concurrent legislative powers: the listing of powers.

The level where the powers are listed is usually the weaker level of government. The ANC, NP & PAC agree that only the concurrent provincial legislative powers should be listed. The ANC & PAC agree that the said provincial competencies should be listed in the manner provided by the present Schedule 6. The NP wishes to add functional areas to the present Schedule 6 and also states that more information must be obtained in this regard. The IFP & DP argue that the exclusive national legislative competencies must be listed. However, the IFP believe that only these powers must be listed whilst the DP also lists exclusive provincial legislative powers as well as functional areas for framework legislation.

1. The ANC believes that concurrent provincial competencies should be listed in the manner provided for by the present Schedule 6. Framework legislation forms a separate category of concurrent legislative competencies (see below). Furthermore, the provinces have exclusive legislative competencies when they legislate on matters specific to the socio-economic & cultural needs of provincial inhabitants, subject, however, to the overrides (see below).

2. The NP believes that the concurrent legislative competencies must be listed - adding agency & delegated functions, water affairs, forestry, public works, land affairs & publication control to the present Schedule 6. The NP suggests that more information is to be obtained before such list is finalised. The NP further believes that exclusive provincial competencies is catered for when the provincial laws prevail (see overrides below); when the provinces pass detail legislation in terms of framework legislation of the national government (see below); & when provinces make laws that are reasonably necessary for or incidental to the effective exercise of their functions. The NP also proposes a

		<p>second list containing the functional areas for framework legislation (see below).</p> <p>3. The IFP believes that the residual legislative competencies of provincial legislatures (see above) provide provinces with exclusive legislative power. Furthermore, the IFP believes that only the exclusive national legislative competencies must be listed as follows: foreign affairs, defence, citizenship, immigration, emigration, extradition & asylum, currency, money & coinage, weights & measures, customs, excise, tariffs, foreign trade, admiralty, maritime law, railways, national public service, industrial & intellectual property rights, monetary policy, national public finance, banking, credit, national statistical services, civil aviation, policing, telecommunication & broadcasting, postal communication. Concurrent provincial legislation only exists in the case of framework legislation (see below).</p>	
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		<p>4. The DP believes that exclusive national legislative competencies must be listed as follows: citizenship, immigration & passports, customs & excise, defence, foreign affairs, mineral & energy affairs, national economic policy, national finance, national intelligence & security, national public service, national public works, transport, posts & telecommunication, registration of companies, trade & industries, water. Furthermore, exclusive provincial legislative competencies must also be listed: casinos, racing, gambling, cemeteries & cremation, clinics & hospitals (excluding teaching hospitals), cultural affairs, delivery of water, electricity & other essential services, education at all levels (excluding university & technicon education), firefighting, ambulance, housing, indigenous & customary law, land affairs, language policy, legal aid, liquor controls, local government, markets & pounds, nature conservation, provincial public media, provincial sport & recreation, roads, regional planning, traditional authorities, provincial public service,</p>	
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		<p>provincial public works, public holidays, trading hours, urban & rural development, waste disposal. The DP also lists functional areas of provincial legislative competency where it is possible for the national government to pass framework legislation (see below).</p>	
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5. The PAC believes that only concurrent provincial legislative competencies must be listed (in keeping with the present Schedule 6).

<p>3. Role of framework legislation to be passed by central (national) government.</p>	<p>The ANC & NP agree that framework legislation forms a separate category of concurrent legislative powers. The NP wishes to add a second list in a Schedule containing the functional areas for framework legislation. The IFP, DP & PAC are also in agreement that there must be framework legislation.</p>	<ol style="list-style-type: none"> 1. The ANC views framework legislation as a separate category of concurrent legislative powers (see above) in order to give elasticity to concurrent powers (where provinces have exclusive power to legislate on the detail). The ANC does not list these functional areas - apparently it is part of the residual legislative competencies of the national government. 2. The NP argues for a Schedule containing a second list of the functional areas for framework legislation (see above). It views these powers as a further category of concurrent legislative competencies. Again, the NP suggests that more information is to be obtained before such list is finalised. 3. The IFP proposes framework legislation for its limited provision of national concurrent legislative competencies. It is the (exclusive) prerogative of provinces to provide the detail of such legislation. In this regard the IFP distinguishes between framework legislation (obliging provinces to legislate against standards established nationally) & general principles of legislation (obliging provinces to legislate 	<p>Further clarity as to exactly what parties mean by using this term.</p>
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		<p>norms & standards in harmony with national principles).</p> <p>4. The DP (as one of the areas where provincial legislation does not prevail - see above) lists the functional areas where the national government is empowered to pass framework legislation for setting minimum standards or uniformity across the nation which are necessary for a particular function to be performed effectively: abattoirs, agriculture, airports, animal control & disease, archives & museums, consumer protection, correctional services, justice, labour, police & public safety, pollution control, population development, provincial public enterprises, public transport, registrations, refugees, road traffic, soil conservation, trade & industrial promotion, university & technicon education, veterinary services, welfare services.</p> <p>5. The PAC is in favour of framework legislation whilst the ACDP does not address the issue of framework legislation.</p>	
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<p>4. The legislative prevalence of the powers of central government (overrides).</p>	<p>The ANC, NP, DP & PAC propose a national override on largely similar grounds. The ANC places the onus on the provinces to show that the overrides do not apply whilst the NP & DP place the onus on the national level to show that the overrides do apply. The IFP allows for a national override on only the narrowest of grounds. The ACDP believe that biblical standards override all legislation.</p>	<p>1. The ANC proposes that national overrides may take place upon the following grounds:</p> <ul style="list-style-type: none"> (a) provided that the Senate has consented; and (b) provided that the law sets minimum or uniform norms or standards across the country, or provides for equal opportunity or access to government services; or (c) provided that the law deals with a matter that affects more than one province or enables the country to act as a single entity or with one voice; or (d) provided that the law establishes a national framework for delivery of services or the management of institutions or providing a public service (see above); or (e) provided that the law deals with the protection of the environment, the economic union of the capital/labour market of the country, the implementation of national economic policies, or the maintenance of security; or (f) provided that the provincial law prejudices the economy, health, safety of the public, or security interests of another province or the country as a whole. The idea is that the Act of Parliament shall prevail over a law passed by the provincial 	<p>The ANC, NP, DP & PAC are to define the powers of override more clearly. A strong basis for complete consensus exists here. The parties (with the exception of the DP which has already done so) should spell out clearly that the Bill of Rights overrides all forms of legislation.</p>
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legislature if the said grounds are met.

2. The NP proposes that there shall be prevalence of provincial laws over Acts of Parliament, except insofar as:

(a) matters cannot be regulated provincially; or

(b) matters require to be regulated or co-ordinated by uniform standards for the management or administration of that matter that apply generally throughout the country; or

(c) the Act of Parliament is necessary to set minimum standards not provided for by provincial legislation for the rendering of services; or

(d) the Act of Parliament is necessary for the maintenance of national economic policies, the protection of the environment across provincial boundaries, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods services, capital & labour, or the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health, or security interests of another province or the country. The idea is that a law passed by a provincial government shall prevail over an Act

of Parliament unless certain grounds are met. Accordingly, the NP believes that the present section 126 should be retained but on narrower grounds. Furthermore, these overrides should be restricted by the principle of subsidiarity (see below) as well as by Constitutional Principle XXII (the national level may not encroach upon the geographical, functional & institutional integrity of the provinces).

3. The IFP rejects the idea of national prevalence or overrides. The IFP merely allows for prevalence of the national government on very narrow grounds: when a province fails to deliver essential services so as to jeopardise the health, safety & welfare of the citizens of the province. However, national overrides are valid & effective only for so long as or insofar as the province concerned has not adopted its own adequate legislative measures.

4. The DP allows for overrides in terms of the Bill of Rights; & states that a provincial law (in the case of exclusive or framework provincial powers - see above) shall prevail over an Act of Parliament unless:

(a) the Act deals with a matter which is the subject of an international treaty or international law to which SA is bound; or

		<p>(b) the provincial law or practice materially & unjustifiably prejudices the economic, health, environment or security interests of another province or of the country as a whole; or</p> <p>(c) the provincial law or practice materially & unjustifiably obstructs the free movement of people, goods, money, information or assets between provinces. Furthermore, a provincial law prevails unless Parliament passes framework legislation in the designated functional areas (see above). In the event of a dispute concerning which level of government should have legislative competence in respect of a particular activity or functional area which cannot be resolved by mediation or by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the provincial legislatures.</p> <p>5. The PAC proposes national overrides according to CP XXI.</p> <p>6. The ACDP suggests that there is an override of legislation (whether of national or provincial nature) where a law does not comply with biblical principles.</p>	
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<p>5. Should the legislative competencies of the provinces be fixed by the Constitution or should the Constitution allow for an evolutionary process?</p>	<p>Most parties agree that provincial powers should evolve, inter alia, by making use of framework legislation. The IFP appears to favour a definitive prescription of powers.</p>	<ol style="list-style-type: none"> 1. The ANC sees framework legislation as providing for the provincial legislative competencies to have some elasticity. 2. The NP submits that constitutional certainty as to the powers at each level of government is needed. Powers are to be set out in the Constitution with, however, enough flexibility to allow for future development & for differences amongst the provinces. This will create the opportunity for asymmetry (see below). 3. The IFP proposes a Constitution where powers are defined definitively. 4. The DP believes the legislative competencies of the provinces should be fixed by the Constitution, but that provinces should be able to take up their powers on an evolutionary basis. 5. The PAC & ACDP do not address this issue directly. 	
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<p>6. Executive competence of provinces.</p>	<p>All parties agree that the provinces shall have executive powers where they have legislative competencies. The ANC, NP, DP, IFP & PAC agree that even more executive competencies (even in areas where no legislative competence exists) must be given to the provinces.</p>	<p>1. The ANC distinguishes between legislative & executive functions on all the levels of government: practical executive functions in the administration must be assigned increasingly to elected & accountable provincial governments as administrative capacity grows while the weight of legislative activity at the national level of government is to be concerned especially with the setting of norms, standards & framework.</p> <p>2. The NP proposes both legislative & executive competencies for provinces in the areas indicated above. That is, the NP believes that the provinces must have executive competence where they have legislative competence.</p> <p>3. The IFP proposes the strengthening of provincial administrative executive powers through the provision of the following national matters to be administered by the provinces: customs, excise & tariffs, federal taxation, national statistical services, post & telecommunications.</p> <p>4. The DP believes that the national & provincial government should have executive competence where</p>	
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		<p>they have legislative competence (see above). Powers & functions at national & provincial (and local) level shall include the power to perform functions for the other levels of government on an agency or delegation basis.</p> <p>5. The PAC believes that the granting of exclusive executive powers to the provinces will satisfy the requirements of CP XIX.</p>	
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<p>7. The Senate.</p>	<p>Most parties support the idea of a Senate representing provincial interests.</p>	<ol style="list-style-type: none"> 1. The ANC believes in co-operative governance & sees the Senate as a body representing provincial interests in national lawmaking - the preferred method whilst the courts will still determine the overrides (see above). 2. The NP strongly favours the introduction of the Senate as a body representing provincial interests. 3. The IFP submissions to TC2 show that it is in favour of a strong Senate to protect provincial interests, however, the IFP also states that relations between levels of government should not be institutionalised. 4. The DP states that the Senate shall have special powers to protect the interests of provinces & to promote co-operation & co-ordination between the national government & the provinces & between provinces themselves. Other possible mechanisms are mooted. 5. The PAC sees no need for a Senate - as it is presently composed it merely represents political party interests. The PAC's support for a Senate will depend upon its composition in terms of the final Constitution. 6. The ACDP does not address this issue. 	
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8. Alternative mechanisms for safeguarding the provinces.	Only the DP & PAC directly address this issue.	The DP moots the possibility of alternative mechanism for safeguarding the provinces. The PAC alludes to mechanisms such as the Financial & Fiscal Commission and the Commission on Provincial Government. The ACDP does not address this issue.	
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<p>9. Local Government.</p>	<p>All parties appear to support strong & independent, democratically accountable local government. The NP states that the national & provincial levels should deal with local government whilst the IFP & DP state that it should be dealt with in provincial constitutions & legislation.</p>	<ol style="list-style-type: none"> 1. The ANC does not address this issue. 2. The NP states that the national & provincial levels must be able to make laws on local government. However, this should not endanger the fundamental status, character or purpose of local government. Recognition by the supreme Constitution means that local government cannot be regulated by the other levels at will. 3. The IFP states that local government should be entirely regulated by provincial constitutions & legislation. Each provincial constitutional shall be entitled to make provision for different categories of local government. Local government cannot be dealt with more specifically than in Chapter 10 of the present Constitution. 4. The DP believes in the maximum devolution of power - substantial powers & functions should be allocated to local government & should be dealt with primarily in provincial constitutions & legislation. 5. The PAC states that local government shall be as independent as possible & that provincial powers should merely be supervisory & co-ordinating powers. 	
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		6. The ACDP believes that the great majority of power should reside at the local level.	
10. Asymmetry	It would appear that most parties support the idea of at least some asymmetry being allowed for. The parties differ with regard to the degree in which and the way in which asymmetry should be allowed.	<p>1. The ANC does not address this issue directly.</p> <p>2. The NP & DP propose that asymmetry be promoted as follows:</p> <ul style="list-style-type: none"> (a) provinces should be allowed to adopt their own constitutions (see below); (b) provinces should be able to take up functions according to their different needs & capabilities; (c) powers should be granted to the provinces not by the executive but by an independent body; (d) agency & delegation should be provided for as well; and (e) framework legislation will aid provincial asymmetry (see above). <p>3. The IFP does not address this issue directly.</p> <p>4. The PAC & ACDP do not address this issue.</p>	
11. Provincial constitutions	Most parties agree that the provinces must be able to draw up their own constitutions.	<p>1. The ANC, NP, IFP & DP propose provincial constitutions. The ANC believes that the (national) Constitution must provide for a framework for provincial constitutions which could allow for variations in defined aspects.</p> <p>2. The PAC & ACDP do not address this issue.</p>	

12. Subsidiarity principle	It is uncertain what the parties who support this principle mean when applying this principle in practice.	The NP, IFP & DP should explain this principle more clearly, that is, which are the functions which can be exercised best at the lowest levels of government?	
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THEME COMMITTEE 3

ADDENDUM

**RECOMMENDATIONS
OF THE
COMMISSION ON
PROVINCIAL GOVERNMENT**

**NATIONAL & PROVINCIAL
LEGISLATIVE & EXECUTIVE
COMPETENCIES**

15 JUNE 1995

Embargoed until 14h00 15/6/95

ADDENDUM:

**THE PRELIMINARY RECOMMENDATIONS OF THE COMMISSION ON PROVINCIAL GOVERNMENT
WITH REGARD TO THE SUMMARY ON:
NATIONAL AND PROVINCIAL LEGISLATIVE AND EXECUTIVE COMPETENCIES**

Constitutional Issues	The Preliminary Recommendations of the CPG
1. The existence of exclusive and concurrent powers.	The Commission takes the Interim-Constitution as its point of departure and provisionally concludes that the powers and functions contained in the present s126 (read together with Schedule 6 to which further functional areas such as finance may be added) are at this stage appropriate to serve the interests of good government in South Africa. However, further consideration needs to be given to the formulation of s126 (as well as to the functional areas listed in Schedule 6) in order to ensure greater legal certainty and compliance with the applicable Constitutional Principles. The CPG points out that two opposite views can be identified with regard to s126: on the one hand it is said that it does provide for exclusive provincial powers but on the other hand this is denied.
2. Role of framework legislation to be passed by central government.	The Commission does not address this issue.
3. The prevalence of the powers of central government.	The Commission does not address this issue. It does point out that in terms of the present arrangements (s126) parliamentary Acts prevail and residual powers are vested in Parliament.

<p>4. Should the competencies of the provinces be fixed by the Constitution or should the Constitution allow for an evolutionary process?</p>	<p>The Commission is of the view that the implementation of the present s126 in the Constitution allows for functional asymmetry to develop (see below on asymmetry). The provinces must also have the right to negotiate with the national government institutions to allow for the performance of national functions on an agency or delegation basis, that is, an evolutionary process.</p>
<p>5. Executive competencies of provinces.</p>	<p>Apart from allowing provinces to adopt constitutions with own executive structures and procedures (see below on provincial constitutions) this issue is not addressed directly by the Commission.</p>
<p>6. Alternative mechanisms for safeguarding interests of provinces.</p>	<p>The CPG points out that in terms of the present system the provinces are allowed to have a say in policy-making and the determination of norms and standards at the national level through the evolving systems of inter-governmental relations. Such arrangements could be formalised in the final Constitution. The CPG further believes that (in a system where parliamentary overrides apply) a second chamber (Senate) could provide necessary checks and balances. The Senate could provide a further means to represent provincial interests (as an effective voice in the national legislature) and therefore the CPG recommends that the Senate is to be retained but restructured to allow for representation of provincial interests.</p>
<p>7. The manner in which the Constitution is to deal with local government.</p>	<p>To date, this matter is not addressed by the CPG.</p>
<p>8. Asymmetry as a constitutional principle governing the allocation of powers.</p>	<p>The provisions of the present s126 (and Schedule 6) enable but do not compel any province to make laws on the subject matters (functional areas) allocated to provinces. This allows for a measure of functional asymmetry to develop. In other words, the CPG believes that this measure of provincial autonomy will allow functional asymmetry to develop.</p>
<p>9. Provincial constitutions.</p>	<p>The CPG cannot support any change to the relevant provisions of the Interim-Constitution which bind provincial constitutions to the national Constitution's provisions relating to these matters: the national Constitution is the supreme law and the provinces merely have the power to adopt provincial constitutions that only differ with regard to the legislative and executive structures and procedures provided in that Constitution. The CPG concludes that the present s160 (with reconsideration of the retention of s160.4(b) provides adequately for provincial constitution-making. Amendments may be considered to ensure conformity with the criteria established by the Constitutional Principles.</p>