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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

DISCUSSION PAPER

WHAT ARE THE REQUIREMENTS OF THE CONSTITUTIONAL PRINCIPLES REGARDING THE CONSTITUTIONAL ALLOCATION OF NATIONAL & PROVINCIAL COMPETENCIES?

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What are the requirements of the Constitutional Principles regarding the constitutional allocation of national and provincial competencies?

(Discussion paper for technical committee on 15 August 1995)

1. Should the Constitution contain one or two lists of functions/functional areas?

The Constitutional Principles are not explicit on the specific question whether the Constitution should contain a list of both national and provincial competencies. Guidance may however be sought from the following excerpts (note specifically the italicised phrases) from the Principles:

XVIII

1. *The powers and functions of the national government and provincial governments* and the boundaries of the provinces *shall be defined in the Constitution.*

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

4. *Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces* shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.

5. Provision shall be made for obtaining the views of a provincial legislature *concerning all constitutional amendments regarding its powers, boundaries and functions*

XXI

The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:

2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, *the Constitution shall empower the national government* to

intervene through legislation or such other steps as may be defined in the Constitution.

8. *The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government* shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXIII

In the event of a dispute concerning the *legislative powers allocated by the Constitution concurrently to the national government and provincial governments* which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

XXV

The national government and provincial governments shall have *fiscal powers and functions which will be defined in the Constitution*

By contrast:

XXIV

A *framework* for local government powers, functions and structures shall be set out in the Constitution. The *comprehensive powers, functions* and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

From this it is clear that the Constitution will have to be specific regarding the nature and content of both national and provincial "powers and functions". Whether that would require two (or more) listings of "powers and functions" is however not self-evident. A test that might be employed, is to consider whether the structure of the present Constitution (containing only one list of "functional areas" in Schedule 6), would satisfy these Principles.

(*for discusstion by the technical committee*).....

2. What is required in the Constitutional Principles regarding "overrides"?

To obtain clarity on this issue, it is necessary first to consider the meaning of the expression "override".

The present Constitution, including the Constitutional Principles, does not employ the expression "overrides". Popularly the provisions of section 126(3) and (4) are referred to as "the overrides", indicating the authority of Parliament to make laws that will prevail over conflicting provincial laws, provided such parliamentary laws conform to the requirements set out in those provisions.

The expression however does not promote clarity, since the introductory phrase of section 126(3) should then also (with reference to matters falling within the provincial competence) be considered to deal with "overrides", but from the point of view of the prevalence of provincial laws.

The question of the prevalence of national and provincial laws is however of prime importance, because it goes to the heart of the question of the distribution of authority between the different levels of government.

Although a number of Constitutional Principles deal expressly with the constitutional *allocation* of "powers and functions", only a few inferences regarding *prevalence* can be found.

- By requiring that "the powers and functions at national and provincial levels of government shall include *exclusive and concurrent powers*", Constitutional Principle XIX implies that there will have to be some form of prevalence of the laws of one or of both levels. The same applies to Constitutional.Principle XXI 6 regarding inter alia provincial planning and development and specific socio-economic and cultural needs, XXI 7 regarding equality of opportunity and access to government services, and XXII regarding the protection of the "geographical, functional and institutional integrity" of a province.
- Constitutional Principle XXI 2 provides as follows (italics added):

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

This coincides broadly with the section 126(3)(b), (c) and (e) of the present Constitution.

- Constitutional Principle XXIII allows for a national "override" in the event of a difficulty in interpretation of the Constitution where legislative powers are allocated concurrently:

  In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

It would therefore appear that the Constitutional Principles do not exhaustively settle the question of the prevalence (or "override") of the authority of either level of government over the other.

It is submitted that the style employed in section 126(3) is therefore not a matter of principle, but that it should rather be considered to be a drafting mechanism.

3. What is required in the Constitutional Principles regarding "residual" powers?

The expression "residual powers" finds its meaning in the notion that certain powers are allocated from a specific reservoir of powers, leaving a "residue" of unallocated powers in the reservoir, which then remains with the original bearer(s) of those powers. The typical application of the concept is where a federation is composed of a number of independent states, each with its own sovereign authority. The component states sacrifice their sovereignty and surrender some of their powers to the federation. Such a process of federation can involve either that the federal authorities are endowed with a specified list of powers, leaving the "residual powers" with the component states, or the powers of

the component states may be listed, and whatever is not listed, is entrusted to the federation.

The Constitutional Principles do not deal with the matter of residual powers. This is explained by the fact that the South African constitutional process is not one comparable to federation. The Republic was endowed, prior to 27 April 1994, through the mechanism of parliamentary sovereignty, with the full reservoir of governmental authority, and from that date onwards continued to hold those powers, subject though to the Constitution (sections 37 and 75). The Constitution replaced parliamentary sovereignty with its own supremacy (section 4) and in section 124 established new entities known as provinces, which were endowed (sections 126 and 144) with competence in the field of a list of functional areas (Schedule 6), taken from, as it were, the reservoir of national competence.

From this it is clear that the provincial competencies are derived from the Constitution and therefore that a construction of residual power vesting in them is untenable.

Constitutional Principle XXI 8 reads as follows:

> The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:
>
> 8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

It is submitted that this Principle does not deal with residual powers, but, as section 126(2) of the present Constitution, with powers *ancillary* to such powers as are specifically allocated. The Principle is not concerned with the mechanism of allocation, but seeks to ensure that the constitutional provisions dealing with the allocation of powers will also be understood to allocate the authority to do whatever is peripherally necessary to exercise those competencies effectively.

4. Framework legislation

In view of the fact that various parties have expressed the view that the new Constitution should employ the mechanism of "framework legislation", it may be useful also to consider its nature here.

4.1 Origins

The prime (and, as far as could be established, only specific) constitutional example of framework legislation is to be found in the *Grundgesetz* (*Basic Law*) of Germany. Section 75 of the *Basic Law* empowers the federal parliament to make "framework regulations" (which is considered in German law to be synonymous to "framework legislation") with regard to a list of specified matters.[1] Framework legislation of the federal parliament is subject to the same limitations applicable to concurrent legislation (section 72 of the *Basic Law*). The limitations are comparable to those provided for in section 126(3) of our present Constitution.

Whether framework legislation should be considered to be a legislative category distinct from concurrent legislation, or if it must be understood to be a form of concurrent legislation, has not been settled in German legal theory. What is however generally accepted, is that the competency to adopt framework legislation is more limited than that regarding concurrent legislation. A federal framework law may not regulate the subject matter exhaustively. Framework laws are intended to provide guidelines within which the legislatures of each of the *Länder* will then make, according to the specific and often different requirements of each, detailed legislative provisions. The framework law is in all respects federal legislation, while the detailed provisions are laws of each *Land*. A law is only considered to conform to the description of a framework law if it *requires substantial* "filling in" and if it is indeed *capable* of being filled in by *Länder* legislation.

1. The listed matters are the legal status of persons in the public service of the *Länder*, of local governments and of other public corporate bodies, general principles of the higher education system, the press and films, hunting, nature conservation and protection, land distribution, regional planning, water affairs, registration of inhabitants and personal documentation (identification and passports).

The purpose of a framework law is to define the boundaries within which the *Länder* are enabled to complete the legislative regulation of the matter. A framework law is not supposed to be more than that. This however does not mean that the framework law must be limited merely to fundamental principles. Apart from prescribing guidelines to the *Länder* legislatures, framework laws sometimes also contain some substantive provisions directly applicable in all the *Länder*.

Framework legislation must be distinguished from *empowering* legislation in which an organ of the executive is e.g. empowered to make detailed provisions by means of subordinate regulations. Framework legislation does not merely empower the adoption of subordinate legislation, because the laws of the *Länder* made in pursuance of a federal framework law are original *Länder* laws applying independently from (though necessarily in conformity with) the framework law.

4.2 Implications for the new constitutional text

Constitutional Principle XIX requires the new constitutional text to provide for exclusive and concurrent competencies of both the national and provincial authorities. This principle cannot be understood either to *require* the inclusion in the Constitution of the competency to make framework legislation, nor is the possibility of providing for such competency *excluded*. Being at most a reduced form of concurrent legislative competency, framework legislation can not be used to fully satisfy the requirements of Principle XIX. Should the Constitutional Assembly therefore consider using the concept of framework legislation, it will have to be an *additional* mechanism, complementary to the required exclusive and concurrent competencies.

The German example of framework legislation may well be useful for the interpretation of Constitutional Principle XXIV, which requires the Constitution to set out "a *framework* for local government powers, functions and structures". Although this principle does not deal with framework legislation properly so called, the German understanding of what a framework is in the context of framework legislation should be of use in determining what the Constitution should (and should not) contain regarding local government.

Direct application of the German concept of framework legislation in South Africa may not be appropriate, but at least guidance may be sought as to its meaning from its country of origin.[2]

4.3 Considerations for employment of the concept

If the notion of framework legislation is to be used in the new constitutional text, it is advisable to provide clearly what it means, because there is no indisputable universal meaning that can be attached to the concept, and even in Germany differences in expert opinion regarding various of its aspects are prevalent.

It does not appear to be advisable to utilise the notion either to diminish the overall scope of the legislative initiative (exclusive or concurrent) allowed the provinces, nor to increase it. Framework legislation is a practical mechanism by means of which national guidance can be given to provinces in complex fields of legislation, without however infringing upon their political, legislative, executive or administrative integrity.

One of many options would be to empower Parliament to make framework laws on matters not falling within the competencies of the provinces, requiring the provincial legislatures to legislate on the execution and administration of such matters on an agency basis for the national government.

Another option would, in view of the lack of clarity surrounding the concept, be not to employ the notion of framework legislation at all, in order to avoid legal uncertainty in an area already charged with potential constitutional conflict.

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2. As a matter of interest, the idea of using the mechanism of framework legislation was seriously canvassed in Switzerland in the late 1970's, but was rejected on the assumption that the mechanism would result in a systematic reduction of the competencies of the cantons in favour of the federation.