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CONSTITUTIONAL ASSEMBLY

MULTI-LATERAL (INTERGOVERNMENTAL CO-OPERATION AND PROVINCIAL POWERS)

Wednesday
20 March 1996
V16
(10h00)

DOCUMENTATION

Entire document embargoed

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CONSTITUTIONAL ASSEMBLY

**MULTI-LATERAL MEETING AS DECIDED AT CC SUB-COMMITTEE ON 18
MARCH 1996**

Please note this meeting will be held as indicated below:

DATE: Wednesday, 20 March 1996
TIME: 10h00 - 18h00, or as required
VENUE: V16

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

Enquiries: Ms M M Sparg, Tel 245-031

DRAFT - 18 MARCH 1996

Status: For multi- and bilateral discussions.

NATIONAL AND PROVINCIAL LEGISLATIVE AUTHORITY

Legislative authority of Republic

- 1.¹ (1) The legislative authority of the Republic is vested in [Parliament]² and confers on [Parliament] the power-
- (a) to amend the Constitution; or
 - (b) to pass legislation with regard to any matter, including a matter within the functional areas listed in Schedule 5³ but excluding any exclusive provincial matter.⁴
- (2) When exercising its legislative authority Parliament is bound only by the Constitution, and must act in accordance with and within the limits of the Constitution.

¹ This section as drafted is broadly supported by the parties, except the DP which proposed the following reformulation for subsection (1):

- (1) The legislative authority of the Republic is vested in [Parliament] and confers on [Parliament] the power -
- (a) to amend the Constitution; or
 - (b) to pass legislation with regard to any matter, including a matter within the functional areas listed in Schedule 5 but excluding:
 - (i) any exclusive provincial matter; or
 - (ii) any legislation that is not necessary for the achievement of an essential national objective as stated in section 3(1)(a), (b) and (c).

² No decision as yet whether the National Chamber of Provinces should be part of Parliament.

³ As the words "any matter" may be misinterpreted to relate only to matters within the exclusive competence of Parliament plus those within the parliamentary overrides in clause 3 of this draft, it is necessary to state categorically that Parliament is competent to legislate fully on the matters within the functional areas in Schedule 5 (and not only the parliamentary override part of those functional areas).

⁴ See clause 2(3) and foot note 10 below.

Legislative authority of provinces

- 2.⁵ (1) The legislative authority of a province is vested in its provincial legislature and confers on the provincial legislature the power -
- (a) to pass a constitution for its province or to amend any constitution passed by it;⁶ or
 - (b) to pass legislation in and for its province with regard to -
 - (i) any matter within the functional areas listed in Schedule 5;⁷ or
 - (ii) any matter outside these functional areas explicitly delegated to it by national legislation.⁸

⁵ Clause as drafted broadly supported by the parties, except the DP which reserved its position.

⁶ The above section must be read with section 154 of the Working Draft which prescribes the procedure for the adoption of a provincial constitution and the conditions to which a provincial constitution must conform.

⁷ NP and DP want concept of framework legislation to be introduced in this section. No agreement on framework legislation.

⁸ Matters of state at the different levels are so interrelated that it may be useful to allow Parliament to delegate further legislative powers to the provinces, for instance where there is a need for provincial legislation to complement specific national legislation in the provinces. This is in line with article 71 of the German Basic Law. It must be pointed out that this kind of provincial legislation will be mere subordinate legislation and completely dependent for its validity on the enabling national legislation. Parliamentary overrides do not come into play here as provincial legislation inconsistent with the enabling national legislation will obviously be *ultra vires*.

This provision may also be a useful instrument to give certain provinces more legislative powers than others (asymmetry). See also foot note 26.

- (2) When exercising its legislative authority a provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with and within the limits of the Constitution and that provincial constitution.⁹
- (3) The passing of a provincial constitution and of any amendments to it is an exclusive provincial [matter].¹⁰
- (4) Legislation passed by a provincial legislature which is reasonably necessary for or incidental to the effective exercise of its power to legislate with regard to a matter within the functional areas listed in Schedule 5, is deemed to fall within those functional areas.¹¹

⁹ Section 156 of the Working Draft is incomplete in that it does not deal with the passing of laws by a provincial legislature under the regime of a provincial constitution. It is suggested that both the Constitution and the provincial constitution should bind the provincial legislature and that this principle should be stated in the Constitution.

The section also makes it clear that a provincial legislature, when exercising its legislative competence which includes the adoption of a constitution, must act in accordance with and subject to the limits of the Constitution (as prescribed elsewhere, e.g. sec. 154).

¹⁰ This clause contemplates vesting the power to pass and amend provincial constitutions exclusively in the provinces. It is suggested that this would satisfy CPXIX which requires both concurrent and exclusive powers for the provinces. This clause must be read with section 154 of the Working Draft which lays down the parameters for provincial constitutions, and also with clause 4 below which regulates the overrides where a provincial constitution and national legislation is in conflict with each other. Such conflicts may arise where a province includes in its constitution provisions dealing with matters that fall inside the concurrent area (Schedule 5 matters).

ANC considering whether "matter" used here and in other relevant sections should not be replaced by "legislative competence".

¹¹ A concern was raised that this provision should also specifically empower Parliament to legislate on "incidental matters". This has been considered but in context of the other provisions, especially clause 1(1)(b), there would appear to be no need for this.

Conflicts between national and provincial legislation¹²

- 3. (1) In the event of a conflict between national legislation and provincial legislation which falls within the functional areas listed in Schedule 5 -**
- (a) the national legislation prevails over the provincial legislation if the national legislation -

¹² This clause is based on the different models in section 159 of the Working Draft. Subclause (1) attempts to lay down the general principle that national legislation which is necessary for the achievement of an essential national objective and applies uniformly with regard to the country as a whole, overrides provincial legislation and that, where this does not apply, provincial legislation overrides national legislation. Subclauses (2) and (3) sets out the specifics of the application of the general principle.

The DP does not support the concept of conflict resolution in this clause and proposes a formulation similar to section 72 of the German Basic Law which would limit Parliament to legislate on Schedule 5 matters to the extent of the Parliamentary overrides. However, the DP subsequently tabled on 12 March 1996 the following formulation for Section 3:

- (1) In the event of a conflict between national legislation and provincial legislation which falls within the functional areas listed in Schedule 5 -
- (a) national legislation for the achievement of an essential national objective prevails over the provincial legislation if the national legislation is necessary for:
- (i) the maintenance of essential national standards;
- (ii) the establishment of minimum standards required for the rendering of services;
- (iii) the maintenance of economic unity; or
- (ic) the maintenance of national security;
- (b) national legislation prevails over the provincial legislation if the national legislation is necessary to prevent unreasonable action by one or more provinces which is materially prejudicial to another province or provinces or the country as a whole
- (c) national legislation prevails over provincial legislation only if it applies uniformly in or with regard to the country as a whole;
- (d) provincial legislation prevails over the national legislation where paragraphs (a), (b) and (c) do not apply.
- (2) National government must not exercise any of its powers so as to encroach upon the geographical, functional or institutional integrity of a province or provinces.

- (i) is aimed at achieving an [essential] national objective;
 - (ii) is necessary for the achievement of that objective; and
 - (iii) applies uniformly in or with regard to the country as a whole;¹³
- (b) the provincial legislation prevails over the national legislation where paragraph (a) does not apply.
- (2) National legislation must be regarded as necessary for the achievement of an [essential] national objective if it -
- (a) deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually;¹⁴
 - (b) establishes -
 - (i) norms and standards;¹⁵
 - (ii) structural, regulatory or other frameworks; or
 - (iii) a national policy,aimed at achieving uniformity across the nation with regard to a matter which in the interest of the country as a whole requires uniformity;
 - (c) provides for -¹⁶
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

¹³ The word "essential" is in contention. Paragraph (a) redrafted as per agreement between ANC and NP.

¹⁴ Paragraph (a) adjusted on the insistence of the NP to bring it into line with section 126(3) of the Interim Constitution.

¹⁵ The previous reference to "minimum norms and standards" has been deleted as per agreement between ANC and NP.

¹⁶ The ANC and NP agreed that the words "the implementation of a national policy which is in the interest of the country as a whole, which includes", be deleted.

- (iv) the promotion of economic activities across provincial boundaries;¹⁷
 - (v) the promotion of equality or equal opportunities; or
 - (vi) the protection of the environment; or
- (d) is aimed at preventing unreasonable action by a province which is prejudicial to another province or the country as a whole.¹⁸
- (3) Unless the contrary is proved, national legislation aimed at achieving an [essential] national objective other than those listed in subsection (2), must be regarded as necessary for the achievement of that objective if it has been supported by the National Council of Provinces [or agreed to in the Mediation Committee] with six provinces having voted in favour of the legislation.¹⁹

Conflicts between national legislation and provincial constitutions²⁰

4. In the event of a conflict between national legislation and a provision of a provincial constitution with regard to -

¹⁷ The term "interprovincial commerce" has been replaced with the agreement of the parties by "economic activities across provincial boundaries" which is more descriptive.

¹⁸ There is uncertainty whether this paragraph should not be dealt with separately in order to comply with certain interpretations of CP21.2. As presently positioned the parliamentary override will only set in if the relevant national legislation applies uniformly in the country as a whole. (See section 126(5) of the Interim Constitution).

¹⁹ This subclause replaces the previous subsection (2)(e) and the previous options for subsection (3) and provides for a rebuttable presumption in favour of a parliamentary override where the relevant national legislation has been approved by the National Council of Provinces or agreed to in the Mediation Committee. However, its ambit has been narrowed down to national legislation

- which is aimed at achieving a national objective, and

- which falls outside the categories listed in subsection (2).

By de-linking subsection (2) from decisions of the Council of Provinces the adjustment ensures that the subsection (2) categories will be fully justiciable by the courts. Consequently the presumption will only apply to residual national legislation and then only to the test of necessity as required in section 3(1)(a)(ii). The question whether the legislation is aimed at achieving a national objective must be proved in the normal way.

The NP suggests the deletion of the words in brackets. ANC will consider this. NP also favours the inclusion of the underlined words. ANC prefers an ordinary majority of the provinces.

²⁰ Conflicts between provincial constitutions and national legislation is a different matter that cannot be resolved by the same rules as applicable to conflicts between national and provincial legislation. It is consequently dealt with separately.

- (a) a matter where this Constitution specifically requires or contemplates the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution; or²¹
- (b) a matter within the functional areas listed in Schedule 5, section 3²² applies as if the affected provision of the provincial constitution were provincial legislation contemplated in that section.²³

Conflicts that cannot be resolved

5. If a dispute concerning a conflict between national legislation and provincial legislation falling within Schedule 5 or between national legislation and a provincial constitution cannot be resolved by the Constitutional Court in terms of sections 3 and 4, respectively, the national legislation prevails over the provincial legislation or constitution.²⁴

²¹ This paragraph only applies to national legislation specifically required by the Constitution, for instance in sections 172, 180 (1) and 187 of the Working Draft.

²² Of this Draft.

²³ This provision is necessary to prevent provinces from attempting to use their constitutions as a means to circumvent parliamentary overrides where these overrides would normally apply.

²⁴ See CP 23. Consideration was also given to CP 22 insofar as that Principle stipulates that the national government may not exercise its powers in such a way so as to encroach on the geographical, functional or institutional integrity of the provinces. It would appear that this Principle does not require the inclusion in the Constitution of a provision following its exact wording, and that the Principle would be complied with if the Constitution, read as a whole, disallows such encroachment.

- 6. Subsidiarity²⁵**
- 7. Asymmetry²⁶**
- 8. Justiciability²⁷**

²⁵ The view is that CP 21.1 is a matter which concerns the allocation of functional areas, e.g. Schedule 5, especially when it comes to the allocation of executive competences. It cannot be understood to intend excluding Parliament from legislating in those areas.

Matter of subsidiarity still unresolved.

²⁶ The current framework as envisaged for the new Constitution provides for asymmetry in the following respects:

- (a) Section 154 provides for institutional and procedural asymmetry in the sense that the provinces can establish and develop their own executive and legislative structures and procedures.
- (b) The draft on the transitional provisions (section 12) allows for an asymmetrical assignment of statutory powers and functions to the provinces in accordance with their administrative capacities. This principle is also contained in section 235 of the Interim Constitution.
- (c) Clause 2(1)(b)(ii) of this Draft provides for the delegation of additional legislative powers to the provinces, which does not exclude the allocation of more powers to some of the provinces.

²⁷ NP wants a provision stating clearly that disputes concerning overrides will be determined by the courts.

SCHEDULE 5

CONCURRENT FUNCTIONAL AREAS

PART A²⁸

Agriculture
Abattoirs
Airports, other than international and national airports
Animal control and diseases
Casinos, racing, gambling and wagering, excluding lotteries and sports pool
Consumer protection
Cultural affairs
Education at all levels, excluding university and technikon education
Environment
Health Services
Housing
Indigenous Law and customary law
Language policy and the regulation of official languages within a province subject to section 6
Local government, subject to the provisions of Chapter 10
Markets and pounds
Nature conservation, excluding national parks, national botanical gardens and marine resources
Provincial public media
Provincial sport and recreation
Public transport
Regional planning and development
Road traffic regulation
Roads
Soil conservation
Tourism

²⁸ No real consideration has been given to this list up to this stage. Police has been removed as it appears to be dealt with explicitly outside this framework in Chapter 13 of the Working draft. NP wants to add

Forestry
Land affairs
Public works
Water affairs
Publication control.

ANC wants local government to be removed.

Words underlined added. NP will consider.

Draft: 18 March 1996

Trade and industrial promotion
Traditional authorities
Urban and rural development
Welfare services

PART B

Any matter where a provision of the Constitution specifically requires the enactment of provincial legislation.

DRAFT - 18 MARCH 1996

Status: For multi- and bilateral discussions.

NATIONAL AND PROVINCIAL EXECUTIVE AUTHORITY

National executive authority

1. (1) The executive authority of the Republic is vested in the President.¹
- (2) The national executive consists of the President and the other members of the Cabinet -
 - (a) who must act in accordance with and within the limits of the Constitution; and
 - (b) who may perform any act required to give effect to the Constitution.

Executive authority of provinces²

2. (1) The executive authority of a province is vested in the provincial executive and confers on the provincial executive the power -
 - (a) to administer all matters within the functional areas listed in Schedule 5 except where provided otherwise in the Constitution or an Act of Parliament;
 - (b) to administer provincial legislation in the province;³
 - (c) to administer national legislation in the province where the administration of that national legislation has been assigned to it in terms of an Act of Parliament;⁴ and
 - (d) to perform any other function assigned to it in terms of the Constitution or an Act of Parliament.

¹ This wording comes from section 76 of the Working Draft.

² See section 133 of the Working Draft.

³ The concept of "provincial legislation" will have to be defined as embracing both new legislation enacted by the province and existing legislation assigned to the province.

⁴ A provision as proposed here may come in very useful where Parliament legislates within the parliamentary overrides on, for instance, uniform norms and standards and assigns the enforcement of the legislation to the provinces.

- (2) The administration of provincial legislation in a province is an exclusive provincial matter;⁵ but, this subsection may not be read as limiting sections 3 and 4.⁶
- (3) The provincial executive consists of the Premier and the other members of the Executive Council who must act in accordance with and within the limits of the Constitution and, if a provincial constitution has been passed for the province, also that constitution.⁷

Executive co-operation

3. An executive organ of state, by agreement with another executive organ of state at the same or any other level of government, may -
 - (a) delegate any of its powers, other than its constitutional powers, to that other organ of state; or
 - (b) authorise that other organ of state to perform any act on its behalf.⁸

**National executive intervention
in provinces⁹**

4. The national executive may assume the administration of any legislation or the performance of any executive function vested in the executive of a province when it is necessary for -
 - (a) the maintenance of national standards or the establishment of minimum standards required for the rendering of services;
 - (b) the maintenance of economic unity;
 - (c) the maintenance of national security; or

⁵ In line with CP XIX which requires exclusive powers for the provinces.

⁶ The proviso is necessary to prevent this provision trumping sections 3 and 4.

⁷ Section 162 of the Working Draft is incomplete in that it does not deal with the exercise of provincial executive power under the regime of a provincial constitution. This is now added.

⁸ Reformulation of sections 161 and 162(2) of the Working Draft. This section may need further development in line with the philosophy behind intergovernmental co-operation.

⁹ This clause is necessary because of section 2 above which confers, inter alia, certain exclusive executive powers to the provinces within the Schedule 5 areas. Where exclusive powers are given CP XXI.2 requires constitutional provision for intervention by the national executive in the circumstances listed in paragraphs (a) to (d) above.

- (d) the prevention of unreasonable action taken by that province which is prejudicial to the interest of another province or the country as a whole.

DRAFT - 18 MARCH 1996

Status: Proposal by Technical Advisers after taking into consideration discussions at a Constitutional Assembly Sub-Committee Meeting on 12 March 1996

DRAFT PROPOSAL ON NATIONAL COUNCIL¹ OF PROVINCES

NATIONAL COUNCIL OF PROVINCES

CONCEPT

- 1 The function of the National Council of Provinces shall be to act as a Chamber representing provincial interests. It shall have the powers to propose revision and thus delay legislation regarding national competencies, and more importantly to initiate, amend or reject/national legislation in respect of the functional areas in which the provinces have concurrent legislative and executive authority.
- 2 The Council will be premised on a direct and strong link with the provinces. Accordingly it should be steered by them and in regard to matters pertinent to provincial government its main activities will be to represent the concerns of that level of government.²
- 3 It is this level of government which is largely responsible for and has administrative experience in the execution and implementation of Schedule 5 legislation. It will also serve the function of exposing the provincial governments and legislatures to the concerns of Parliament, of national government and of other provincial governments, and also promoting co-responsibility between levels of government for the joint administration of the country as a whole. The National Council

¹ **It has been suggested by the National Party that the word 'Council' could be replaced by the word 'Chamber'. This matter may be better resolved once the issue described in paragraph 4 is resolved.**

² There is still some debate as to the value of a second house or house of general legislative revision. Such Chamber is considered by some, including the PAC, to be expensive and to present no new perspective in the legislative debates. It can not justify, it is argued, special legislature powers and it plays no meaningful function if it simply mirrors the composition of the Assembly. This reasoning would not, however, apply if the chamber is specifically structured to bring the province's views to Parliament. This is only so if the provincial representations are determined by provinces and not national caucuses.

will also have the power to monitor inter-governmental executive relations.

- 4 It is recorded that this body is a legislative organ. The exact functions will be spelt out as specific to this body. It has been suggested it should have the status of a parliamentary chamber. Its formal inclusion in the definition of Parliament remains to be finally resolved.³

National Council of Provinces

Composition

1. (1) There shall be a National Council of Provinces through which the provinces participate in the national legislative process.
- (2) **The National Council shall comprise of 9 provincial delegations of 10 members each directly elected (or appointed) by each provincial legislature in proportion to the support enjoyed by the political parties and of which: 5 persons shall be delegated from the sitting members of the legislature by the legislature to attend specific Council meetings (option: substitute 3 for 5): 5 persons shall be full-time members of the Council (Option: substitute 7 for 5)**
- (3) **Members elected to sit in the National Council on a full-time basis shall cease to be members of the provincial legislature unless it loses confidence in its representatives. ⁴**

Participation in National Legislative Process

- 2.1 (a) The National Council shall have the power to consider legislation dealing with matters which fall within the exclusive competence of national government.

³ An opinion from the Technical Committee/Panel is awaited on the implications of defining Parliament so as to include the National Council of Provinces.

⁴ This is the recall option in respect of which no argument has been raised but which requires further consideration and elaboration.

- (b) The National Council may consent or to object to such legislation and may propose amendments thereto.
 - (c) Where the National Council has proposed amendments or has objected to such a Bill, the National Assembly must reconsider such a Bill and amendments if any and may, **after 30 days has elapsed since the National Council proposed such amendments or objected to the Bill,** pass the Bill with or without such amendments by a simple majority.
 - (d) The National Council and the National Assembly may establish any joint committee in accordance with their respective rules to consider such a Bill and any amendments proposed thereto.
- 2.(2) All Bills which effect the exercise or performance of the powers and functions of the provinces as provided in schedule 5, excluding appropriation bills and amendments to the Constitution shall be dealt with by the National Council as follows:
- (a) if the Council supports the Bill, it must be submitted to the President for assent;
 - (b) if the Council proposes amendments or opposes the Bill, the Bill together with any proposed amendments must be referred to the Mediation Committee;
 - (c) if the Mediation Committee agrees on the version of the Bill as passed by the National Assembly, the Bill must be submitted to the President for assent;
 - (d) **If the mediation Committee agrees on a different version of the Bill to that approved by the National Assembly, such amended Bill must be referred to the Assembly for approval before it is submitted to the President for assent, or if the Mediation Committee agrees to a different version of the Bill to that proposed by the Council, it shall also be referred to the Council for approval; and⁵**
 - (e) if the Mediation Committee fails to agree on the Bill or amendments thereto, the Bill shall lapse unless the Assembly approves such Bill by a majority of at least 2/3 of its members present.

⁵ The original proposal has been removed in accordance with the Sub-Committee meeting of 12 March 1996.

(Option. If the Mediation Committee fails to agree on the Bill, or amendments thereto, the Bill shall lapse.)

3. **Financial Bills**

- 3.1 All appropriation Bills shall be dealt with in terms of procedures set out in section 2(1).
- 3.2 Other Bills having financial implications for provincial government with regard to the functional areas listed in schedule 5, shall be dealt with in terms of the procedures set out in section 2(2)⁶.

4. **Constitutional Amendments**

- 4.1 The approval of 2/3 of the total number of members of the National Council shall be required for any constitutional amendment which amends any provisions of the Constitution dealing with provinces.
- 4.2 In the event that a constitutional amendment amends the powers and functions of a specific province or provinces, the approval of the legislature of such province or provinces shall be required.⁷

5. **Mediation Committee**

- 5.1 The Mediation Committee shall consist of (a) one delegate from each province designated by members of the province in the National Council and (b) 9 members of the National Assembly elected by the Assembly in proportion to the representation of the parties represented in the Assembly.
- 5.2 Support by the majority of the members of the National Assembly and by the majority of the delegates of the National Council on any issue placed before the Mediation Committee shall constitute an agreement by the Committee.

6. **Voting in the Council**

- 6.1 **With regard to all decision the Council which relate to legislation or bills within the functional areas specified in Schedule 5, each Province shall be entitled**

⁶ The Council may have other roles. The DP has proposed that in regard to Appropriation Bills that provide for allocations to the province that deviate from the recommendation of the Fiscal and Financial Commission the National Council of Provinces' approval should be required.

⁷ **Option has been removed in accordance with the Sub-Committee meeting of 12 March 1996.**

to one vote to be cast by its representatives in accordance with the mandate given by the provincial legislature.⁸

6.2 With regard to all decisions other than those which affect the exercise of performance of the powers and functions of the provinces as provided in Schedule 5, each member of the Council shall exercise a vote and the Council shall take its decisions by a majority of such votes cast.⁹

7. Powers to summon Ministers

7.1 The Council shall have the power to summon national Ministers and officials of the Executive to the Council and its committees.

7.2 Members of the Cabinet shall have the right to address the National Council or its committees in respect of any deliberations regarding legislation affecting their portfolio.¹⁰

8. Appointments

8.1 The National Council may confirm the appointments set out in Schedule X.¹¹¹²

⁸ The precise way in which the legislature gives its instructions requires further consideration. It could be done by allowing the leader of the representatives in 1(2)(b) to cast the vote. Some foreign experts have advised against the requirement that the provincial delegation be given its mandate by way of a resolution of the legislature as this may be overly restrictive and unhelpful to the process of negotiations between 10 parties. This is a matter which could be left to the provincial legislature itself to decide, or alternatively the Council. Provided it is accepted that the logic behind the operation of the Council is that provincial delegations should respond to provincial mandates and not national caucus mandates (thereby duplicating the views of the National Assembly) it would be possible to design a practical mechanism to allow the provincial delegation to act in accordance with the provincial legislature instructions. One such method would be to provide that the leader of the delegation shall cast the vote on behalf of the delegation and by providing that the leader shall be a member of the Executive Committee of the province concerned. Should the principle be dispensed with altogether, it would strengthen the argument to deprive the Council of a veto right as set out in 2.2. A further and specific draft proposal will be furnished in regard to such a mechanism in due course.

⁹ The option of individual voting in regard to the 'comment' bills is useful in that it absolves the provincial legislature of the need to give instructions on these bills which, in any event, the Council cannot veto.

¹⁰ The DP asserts that members of the Cabinet shall not have a right to address committees as this is not contained in the Interim Constitution.

¹¹ It has been proposed that certain national appointments which more directly impinge on provincial administration (e.g. Public Protector or Provincial Public Protectors) could be confirmed by the Council.

9. Chairpersons

- 9.1 The Chairperson of the National Council shall be a member of the National Council elected by the Council.
- 9.2 Upon election, a Chairperson shall have no vote and his or her delegation may fill the vacancy caused by such an election.
- 9.3 The term of office of such a Chairperson shall be for one year and he or she shall be succeeded by a person chosen from another province. Provision shall be made for Deputy Chairpersons.

Option

- 10.1 There shall be a President of the Council who shall be appointed by the President.
- 10.2 The President of the Council shall have no vote and shall be responsible for the Secretariat.
- 10.3 There shall be two vice-presidents who shall be elected annually at a meeting of the council of Premiers from amongst their numbers.
- 10.4 At least one of the vice Presidents shall be elected from one of the minority parties if such a minority party is a majority party in a province.

11. General

- 11.1 The permanent members of the National Council of Provinces shall be entitled to participate in the deliberations of the Provincial Legislatures from which they have been elected and in the committees of such legislatures but shall have no vote therein.
- 11.2 Properly mandated representatives (delegates) of local government may attend and participate in the National Council and their committees but may not vote.

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It has also been proposed that the National Council could confirm the appointment of Constitutional Court judges but the viability of such a proposal would depend on whether the Council also participates in the Judicial Services Commission. In view of the fact that the constitutional proposals regarding the Public Service Commission and the Fiscal and Financial Commission specify that they will be comprised *inter alia* of members directly elected by the provinces, it would not be appropriate to have the Council also confirm these appointments.

11.3 The Council shall have the right to express itself by passing resolutions on any matter of concern including the performance of the national or provincial executives and their members.¹³

¹³ It is not clear whether this clause is necessary, as the Council would have such powers anyway. It is included to indicate that this power is not excluded.

- Scope for continued medium and long-term evolutionary development of provincial government should be provided for in the new Constitution without either pre-programming its gradual demise, or entrenching its perpetuation regardless of a possible eventual failure of the provincial system for whatever reasons.
- Constitutional Principle XXI does not provide the Constitutional Assembly with the only, nor the clearest set of criteria for the constitutional crafting of the appropriate balance between national and provincial competences: *it is rather Constitutional Principle XXII, read with inter alia CP's XVI - XX, that provides us with the required objective criteria.* The criteria that can (and due to the nature of the Constitutional Principles, must) be gleaned from these Principles are particularly attractive from a drafting point of view, because they are reasonably capable of being developed by the courts into a practicable judicial measure.
- The key notion contained in CP XXII is the protection of the *geographical, functional and institutional integrity of the provinces.* The Constitutional Principles conceive provincial integrity to be reflected in the existence of provincial government as a *distinct level of government* (CP XVI), composed *democratically* (CP XVII), with *competences provided for in the Constitution* (CP XVIII), some of which must be *exclusive* and some *concurrent* (CP XIX), and the whole having to be *adequate for the purposes of effective government* (CP XX). All of this must in some form be provided for in the new Constitution, presenting in combination a clear picture of what must be considered to be "provincial integrity" as contemplated in CP XXII.

Should the above suggestions be generally accepted by the parties represented in the Constitutional Assembly, it would be possible to draft a relatively uncomplicated "conflict of competencies" provision to improve clause 3 of the draft of 12 March, thereby solving the outstanding political and technical differences and difficulties. By way of demonstrating such solution, the following is presented for consideration:

- Clause 3(1) might be used as it is, perhaps with the addition of some or all of the considerations regarding "overrides" and allocation of functions to the national government mentioned in CP XXI (and in sub-clause (2) of the draft) in order to provide future national governments with *guidelines* (as opposed to an ineffective criterion for adjudication) for its conduct in the field of co-ordinated and co-operative government.
- Sub-clause (3) of the draft of 12 March might then become sub-clause (2).
- A new clause 3(3) might then be framed as follows:

(3) The democratic,¹ geographical, functional and institutional integrity of a province,² and the structuring of effective¹ government at national,

1 . Constitutional Principle XVII.

2 . Constitutional Principle XXII.

**TECHNICAL COMMENTARY: CONSTITUTIONAL PROVISIONS ON
PROVINCIAL COMPETENCIES**

From the relevant documentation and debates to date, it would appear that the following considerations, concerning which consensus largely exists, characterise the issue of provincial competencies in the new Constitution:

- The relevant Constitutional Principles must be satisfied.
- The evolution of a suitable provincial system must be facilitated by the Constitution while national government must be empowered to ensure good overall governance in all parts of the country, involving co-ordination, national integrity and inter-governmental co-operation.
- The matter should (and must in terms of the Constitutional Principles) be constitutionalised to ensure an appropriate balance between national and provincial responsibilities.
- Workable legislative, executive and judicial constitutional mechanisms must be devised to maintain the above mentioned balance.
- Positive progress has been achieved regarding the design of the desired legislative mechanism (the National Council of Provinces), and it seems likely that a satisfactory solution regarding executive mechanisms is being developed.
- A major difficulty however exists regarding the provision of a practicable *judicial* test for the adjudication of disputes concerning the prevalence of national or provincial actions (the German experience has shown the "necessity" test to be problematic.)

The balancing of the authority of the different levels of government is a perennial and often vexed question in any composite state, especially where, as in our case, one sphere of government (the provinces) has only recently been established and is in a process of building the capacity to govern and administer.

The approach followed in the 1993 Constitution (section 126 and related provisions) is generally considered not to be satisfactory for various reasons, including the absence of unambiguous criteria for the adjudication of disputes, and the legalistic and overly complex framing of the relevant provisions. It is submitted that the draft of 12 March before the CC Sub-Committee is subject to the same shortcomings, no doubt in deference to the wording of Constitutional Principle XXI.

The following **suggestions** are offered in the hope that it might be of use in the process of resolution of the long-standing impasse concerning provincial competencies:

- A formulation relying on a "necessity test" must be avoided in view of the difficulties that it presents for interpretation and adjudication, as well as the complex drafting and confusing presumptions that it gives rise to (as in section 126 of the 1993 Constitution and clause 3 of the draft before the CC Sub-Committee).

provincial and local levels as provided for in this Constitution,⁴ may not be encroached upon by the national government in terms of legislation adopted in terms of subsection (1).

In order to present a consolidated picture of what is suggested above, the following clear text (which will no doubt require technical refinement) of a possible substitute for clause 3 of the draft of 12 March, is submitted for consideration:

Conflicts between national and provincial legislation

3. (1) In the event of a conflict between national legislation and provincial legislation which falls within the functional areas listed in Schedule 5 —

(a) the national legislation prevails over the provincial legislation if the national legislation —

(i) is aimed at achieving an [essential] national objective;

(ii) is necessary for the achievement of that objective;

(iii) applies uniformly in or with regard to the country as a whole;

[(iv) is necessary to deal with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually;

(v) is necessary to establish norms and standards, ; and

(vi) is necessary to provide for the maintenance of national security, ...]⁵

(b) the provincial legislation prevails over the national legislation where paragraph (a) does not apply.

(2) Unless the contrary is proved, national legislation aimed at achieving an [essential] national objective other than those listed in subsection (1), must be regarded as necessary for the achievement of that objective if it has been supported by the National Council of Provinces⁶

(3) The democratic, geographical, functional and institutional integrity of a province, and the structuring of effective government at national, provincial and local levels as provided for in this Constitution, may not be encroached upon by the national government in terms of legislation adopted in terms of subsection (1).

Francois Venter, 13.3.96

3. Constitutional Principle XX.

4. Constitutional Principle XVI.

5. Bracketed provisions taken from clause 3(2) of the draft of 12 March.

6. This is clause 3(3) of the draft of 12 March.

UNMANDATED DRAFT

**(To be inserted after section 2
of the Working Draft)**

Government under the Constitution

- 2A. (1)** Government in the Republic is premised on three distinct but inseparable spheres of government, national, provincial and local.
- (2)** National, provincial and local government must equally be committed -
- (a)** to effective, responsive, accountable and open government;
 - (b)** to preserving the unity and indivisibility of the Republic; and
 - (c)** to providing coherent government in the interest of the Republic as a whole, based on co-operation among the spheres of government and respect for each other's status, institutions and functions.

UNMANDATED DRAFT

**To be inserted after section 117
of the Working Draft**

Founding principles of provincial system

117A.

- (1) The provinces are part of and inseparable from the Republic, and the people of the provinces are part of and inseparable from the South African nation.
- (2) The provinces must be committed to the promotion of national unity, the pursuit of peace and the well-being of the people in their areas.
- (3) The provinces may not assume powers other than those conferred on them in the Constitution.

(To be further developed. Other homogeneity provisions provided in new proposed section 154C)

UNMANDATED DRAFT

(To replace section 154 of the Working Draft)

PROVINCIAL CONSTITUTIONS

Passing of provincial constitutions

- 154.** (1) For a provincial legislature to pass a constitution for its province a vote of a majority of at least two thirds of its members is required.
- (2) If a provincial legislature has passed a constitution for its province the Speaker of the legislature must submit the text of the constitution to the Constitutional Court for certification.

Certification of provincial constitutions

154A. No text of a provincial constitution passed by a provincial legislature can become law unless the Constitutional Court has certified -

- (a) that the text has been passed in accordance with section 154; and
- (b) that all the provisions of the text comply with section 154C.

Signing, promulgation and safekeeping of provincial constitutions

- 154B.** (1) The Premier of a province must assent to and sign the text of a provincial constitution certified by the Constitutional Court.
- (2) The text assented to and signed by the Premier must be promulgated and becomes law upon its promulgation.
- (3) A provincial constitution must be published in the national government gazette.
- (4) The signed text of a provincial constitution is conclusive evidence of its provisions and must be entrusted for safekeeping to the Constitutional Court immediately after promulgation.

Contents of provincial constitutions

154C. (1) Within the limits prescribed in subsections (2) and (3) a provincial constitution may contain provisions concerning -

- (a) any matter provided for in this Chapter; and
- (b) any matter within the functional areas listed in Schedule 5.

- (2) A provincial constitution must be consistent with this Constitution, and may deviate from this Constitution to the extent only that it -
- (a) establishes legislative and executive structures different from those established in this Chapter for provinces; and
 - (b) provides for the institution, role, authority and status of a traditional monarch in the province.
- (3) Provisions in a provincial constitution which deviate from this Constitution in terms of subsection (2) -
- (a) must be compatible with the system of government provided for in this Constitution, and in particular with -
 - (i) multi-party democracy based on free and regular elections;
 - (ii) universal adult suffrage and a common voters' role;
 - (iii) an electoral system that results, in general, in proportional representation; and
 - (iv) participation of minority parties in the legislative process in a manner consistent with democracy;
 - (b) must provide for the separation of powers between legislative and executive structures, with appropriate checks and balances to ensure accountability, responsiveness and openness; and
 - (c) may not confer on the province or any provincial organ of state powers and functions that fall outside the area of provincial competence in terms of this Constitution.

Amendments to provincial constitutions

154D.

Sections 154 to 154C apply also to amendments to provincial constitutions, and in applying those sections a reference to a provincial constitution must be read as a reference to an amendment to a provincial constitution.

**EXTRACT FROM DRAFT CONSTITUTION
COMPLEMENTARY BILL - 14 MARCH 1996**

Status: For multi-lateral and bilateral discussions

Transition: Parliament¹

Option 1: (Suspension of Chapters 3 and 4 of new Constitution)

7. (1) No election of the National Assembly may be held before 30 April 1999 unless the Assembly is dissolved after a vote of no confidence in the Cabinet.²
- (2) Until the National Assembly is reconstituted in terms of an election after 30 April 1999 -
- (a) Chapter 4 of the previous Constitution continues to apply;³
and

¹ The transitional provisions contained in this section are based on an assumption that the Senate would be replaced by a National Council of Provinces. As the composition of the National Council would depart radically from that of the Senate, provision will have to be made for the accommodation of the incumbent senators. There would appear to be three options:

Option 1: A continuation of the present two chamber Parliament until 30 April 1999, which would require the suspension of at least Chapters 3 and 4 of the new Constitution until that date. This option would render implementation of the new Constitution before 30 April 1999 very difficult.

Option 2: Immediate implementation of Chapters 3 and 4 of the new Constitution with the incumbent senators becoming members of their respective provincial legislatures. This would result in a temporary increase in the membership of these legislatures, but would, on the positive side, open the way for senators to represent their provinces in the National Council of Provinces.

Option 3: Immediate implementation of Chapters 3 and 4 with the incumbent senators becoming members of the National Assembly, in which case the membership of the NA will temporarily until 30 April 1999 be increased to 490.

If on the other hand it is decided to retain the present or an adjusted Senate a simple transitional provision would be needed.

² See CP XXXIII.

³ Chapter on Parliament, i.e. both National Assembly and Senate.

(b) Chapters 3 and 4 of the new Constitution are suspended.⁴

Option 2: (Senators becoming members of the provincial legislatures)

7. (1) No election of the National Assembly may be held before 30 April 1999 unless the Assembly is dissolved in terms of section 93(1) of the new Constitution after a vote of no confidence in the Cabinet.
- (2) Until a new National Assembly is constituted in terms of an election under the new Constitution the Assembly consists of 400 members.⁵
- (3) Anyone who was a member or office-bearer of the National Assembly immediately before the new Constitution took effect, becomes a member or office-bearer of the National Assembly under the new Constitution, and holds office as a member or office-bearer subject to the new Constitution.
- (4) The National Assembly as constituted in terms of subsection (3) is for all purposes deemed to have been elected under the new Constitution for a term which expires on 30 April 1999.⁶
- (5) The rules and orders of the National Assembly in force immediately before the new Constitution took effect, continue in force subject to any amendment or repeal under the new Constitution.
- (6) Anyone who was a member of the Senate immediately before the new Constitution took effect becomes a member of the provincial legislature of the province from which that person was nominated as a senator.⁷
- (7) Until a provincial legislature is constituted in terms of an election

⁴ If the present Senate is to be abolished from a future date, e.g. 30 April 1999, it will be virtually impossible, because of the interrelatedness of the two Houses in the Interim Constitution, to implement the Chapter on the NA in the new Constitution alone. Many other provisions of the new Constitution will also be affected.

⁵ The agreement in the CC Subcommittee is that the NA will consist of between 300 and 400 members as determined by national legislation. However, the 400 membership will have to be retained until 30 April 1999 as no election may be held before that date.

⁶ This provision is necessary to slot the present NA into the new provisions in Chapter 3. See for instance section 46(3) of the 3rd Ed. Working Draft.

⁷ See section 48(2) of the Interim Constitution. As the senators were proportionally nominated on the basis of voting patterns in the province, the inclusion of the senators in the provincial legislatures will not upset proportionality in the legislatures.

under the new Constitution the legislature consists of the number of members determined for the legislature under the previous Constitution plus nine; but, vacancies occurring among members of the legislature who became members because of their membership of the Senate, may not be filled.

Option 3: (Senators becoming members of the National Assembly)

- 7.
- (1) No election of the National Assembly may be held before 30 April 1999 unless the Assembly is dissolved in terms of section 93(1) of the new Constitution after a vote of no confidence in the Cabinet.
 - (2) Until a new National Assembly is constituted in terms of an election under the new Constitution the Assembly consists of 490 members.
 - (3) Anyone who was a member of the National Assembly or the Senate, or an office-bearer of the Assembly immediately before the new Constitution took effect, becomes a member or office-bearer of the National Assembly under the new Constitution, and holds office as a member or office-bearer subject to the new Constitution.
 - (4) The National Assembly as constituted in terms of subsection (3) is for all purposes deemed to have been elected under the new Constitution for a term which expires on 30 April 1999.
 - (5) Vacancies occurring in the office of members of the National Assembly who became members because of their membership of the Senate, may not be filled.
 - (6) The rules and orders of the National Assembly in force immediately before the new Constitution took effect, continue in force subject to any amendment or repeal under the new Constitution.

**EXTRACT FROM DRAFT CONSTITUTION
COMPLEMENTARY BILL - 14 MARCH 1996**

Status: For multi-lateral and bilateral discussions

Transition: Provincial legislatures

9. (1) Until a new provincial legislature is constituted in terms of an election under the new Constitution the legislature consists of the number of members determined for that legislature under the previous Constitution.⁸
- (2) Anyone who was a member or office-bearer of a provincial legislature of a province immediately before the new Constitution took effect becomes a member or office-bearer of the legislature for that province under the new Constitution, and holds office as a member or office-bearer subject to the new Constitution.
- (3) A provincial legislature as constituted in terms of subsection (2) is for all purposes deemed to have been elected under the new Constitution for a term which expires on 30 April 1999.⁹
- (4) The rules and orders of a provincial legislature in force immediately before the new Constitution took effect, continue in force subject to any amendment or repeal under the new Constitution.

⁸ But see Option 2 under section 7 and footnote 7 above.

⁹ This provision is necessary to slot in with section 125(3) of the Working Draft.

**EXTRACT FROM DRAFT CONSTITUTION
COMPLEMENTARY BILL - 14 MARCH 1996**

Status: For multi-lateral and bilateral discussions

Provincial constitutions

11. (Provisions needed if any province passes a constitution before the new Constitution takes effect).¹⁰

¹⁰ Should any province adopt a provincial constitution before the new Constitution takes effect, provision will have to be made for a requirement that the provincial constitution must comply with the new Constitution.

**EXTRACT FROM DRAFT CONSTITUTION
COMPLEMENTARY BILL - 14 MARCH 1996**

Status: For multi-lateral and bilateral discussions

Assignment of old order legislation to provinces

12. (1) Old order legislation with regard to a matter within a functional area listed in Schedule 5 of the new Constitution and which, when the new Constitution took effect, was administered by an authority within the national executive, may be assigned by the President, by proclamation in the Government Gazette, to an authority within a provincial executive designated by the Premier of the Province.¹¹
- (2) If it is necessary for an assignment of legislation under subsection (1) to be effectively carried out, the President, by proclamation in the Government Gazette, may -
- (a) amend or adapt the legislation to regulate its interpretation or regulation;
 - (b) where the assignment does not apply to any piece of legislation as a whole, repeal and re-enact, with or without any amendments or adaptations referred to in paragraph (a), those of its provisions to which the assignment applies or to the extent that the assignment applies to them;
 - (c) regulate any other matter necessary as a result of the assignment, including the transfer or secondment of staff, or the transfer of assets, liabilities, rights and obligations, to or from the national or a provincial government or any department of state, administration, force or other institution.¹²
- (3) When legislation is assigned under subsection (1), any reference in the legislation to an authority administering it, must be construed as a reference to the authority to which it has been assigned.
- (4) Any assignment of legislation under section 235(8) of the previous

¹¹ The provision is necessary to provide for the President to assign certain laws which are still administered at the national level, to the provinces. As indicated in section 12(1) above this relates only to Schedule 5 legislation, i.e. laws falling within the provincial functional areas.

¹² Subsection (2) above is a virtual re-enactment of section 235(8)(b) of the Interim Constitution and goes hand in glove with the main function of assigning laws contained in subsection (1). The President's power to amend laws when assigning them is a very limited one which can only be exercised to the extent necessary to make the assignment effective.

Second draft: 14 March 1996

Constitution including any amendment, adaptation or repeal and re-enactment of any legislation and any other action taken under that section, is deemed to have been effected under this section.¹³

¹³ The general rule is that if an enabling provision (such as section 235(8)), of the Interim Constitution, is repealed subordinate legislation and arrangements made under that provision are automatically cancelled. Section 12(4) is necessary to avoid this happening as far as measures taken under section 235(8) are concerned.

