

Copied for committee #887

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TO: The Technical Committee on Constitutional Issues

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COMMENTS BY DEMOCRATIC PARTY ON THIRD REPORT
 OF TECHNICAL COMMITTEE ON CONSTITUTIONAL AFFAIRS

1. Fiscal Powers
 - 1.1 As will be seen from the amended text (below) we suggest that fiscal powers are more appropriately referred to in para 3.3 than in a separate para 3.6.
 (See Annexure 'A')
 - 1.2 Inclusion of the words 'and fiscal' in para 3.3 would refer to 'fiscal' powers in the same term as it refers to 'legislation and executive' powers i.e. the following concepts would be included in relation to fiscal powers.
 - 1.2.1 'appropriate and adequate'
 - 1.2.2 'and functions'
 - 1.2.3 'that will enable each level to function effectively'
 - 1.2.4 para 3.4 amendments to powers and functions "require the approval of a specified majority of the legislations of the SPR's."

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2. Constitutional provision for financial and fiscal allocation

2.1 Whether a "Financial and Fiscal Commission" is a mechanism or a principle is debatable.

2.2 However, we contend that what is of critical importance is that national and SPR governments should each have a constitutional right to fiscal and financial allocations and that such basic allocations should not be in the discretion of the national government.

2.3 On the assumption that the concept of a "Financial and Fiscal Commission" is admitted as a principle we would advocate rewording paras 3.7 and 3.8 as follows:

(See Annexure 'B')

3. General and National Government

3.1 We believe that it is advisable to insert the words "and accountable" as shown in para 3.9.1.1.

(See Annexure 'C')

3.2 We are concerned at the dominant concept of "national standards" (para 3.9.1.4) "uniformity" (para 3.9.2.2) and "minimum standards" (para 3.9.2.3)

(See Annexure 'D')

3.3 We do not subscribe to the view that a central government is automatically more competent than SPR governments in determining 'standards'. Also an excessive use of national standards will inhibit the creativeness and detract from the feasibility of the whole SPR system.

3.4 If standards or uniformity are going to apply nationally then we argue

- 1) that they should only apply in constitutionally defined areas, and
- 2) a legislative chamber, eg a senate in which SPR's are represented directly should be part of the decision-making process on such standards and uniformity.

4. SPR Government

4.1 We consider it wrong to limit the powers of SPR government's to the concept of "as may be necessary" (para 3.9.3.)

4.2 In paras 3.9.2.1 to 3.9.2.4 the Committee sets out the criteria for powers to be allocated to the national government.

In para 3.9.4 the Committee sets out the criteria for the allocation of concurrent powers.

In para 3.9.1.4 the Committee sets out the criteria for the exercising of concurrent/overriding powers.

4.3 In the circumstances the powers of SPR's referred to in para 3.9.3 should read "as defined in the constitution".

(See Annexure 'E')

5. Residual Powers

5.1 We believe that it would be preferable to allocate powers specific to the national government and to SPR governments, whether these powers be allocated exclusively or concurrently, and to define these powers in the constitution.

5.2 Should it transpire that certain powers have not been so allocated and defined, the Constitutional Court would do such allocation and definition.

5.3 Para 3.9.5 would accordingly be amended as follows:

(See Annexure 'F')

6. Asymmetry

6.1 The Democratic Party has no objection to institutional asymmetry as referred to in para 4.3. We are strongly of the opinion that the institution of government should be consistent with the general constitutional principles upon which the constitution is based.

6.2 While there is a strong case to be made out for temporal asymmetry as referred to in para 4.4 each SPR should have the underlying right to the same powers and functions.

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on behalf on THE DEMOCRATIC PARTY

2.14 Amendments to the constitution shall require special procedures involving specified majorities.

3. Principles dealing with the allocation of powers to different levels of government

3.1 Government shall be structured at national, SPR and local levels.

3.2 At each level of government there shall be democratic representation.

"A"

3.3 Each level of government shall have appropriate and adequate legislative ~~and~~ ^{and fiscal} executive/powers and functions that will enable each level to function effectively.

3.4 The powers and functions of each level of government shall be defined in the constitution. Amendments to the constitution which alter the powers, boundaries, functions or institutions of regions shall in addition to any other procedures specified in the constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPR's, and if the amendment concerns specific SPR's only, the approval of the legislatures of such SPR's will also be needed.

3.5 The powers and functions of each level of government may include exclusive and concurrent powers, as well as the power to perform functions for other levels of government on an agency or delegation basis.

~~3.6 Each level of government shall have fiscal powers which will be defined in the constitution.~~

"B"

3.7 A Financial and Fiscal Commission, including representatives of each of the SPR's, shall be constituted ^{determine} ~~to advise the national government on~~ the distribution of financial and fiscal resources.

"B"

3.8 Fiscal and financial allocations ^{to} by the national government ^{and} to SPR governments shall be made on an equitable basis after taking into account the national interest, disparities within SPR's, ~~the advice of the Financial and Fiscal Commission~~, the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPR's.

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

3.9.1 General

"C"

3.9.1.1 The level at which there is most control over the quality and delivery of services, should be the level responsible *and accountable* for the execution of the programme or the delivery of the services.

3.9.1.2 The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the territorial, functional or institutional integrity of the SPR's.

3.9.1.3 In the event of a dispute concerning the legislative powers allocated by the constitution concurrently to the national and SPR governments, precedence shall be given to the legislative powers of the national government.

In dealing with this issue we have made extensive use of the report on Constitutional Options and their Implications for Good Government and a Sound Economy prepared by a group of experts which consisted largely of South Africans of different political persuasions, published in March 1993 by the Consultative Business Movement.

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832

"D"

3.9.1.4 Where it is necessary for the maintenance of national standards, the maintenance of economic unity, the maintenance of national security or the prevention of action taken by one SPR which is prejudicial to the interests of another SPR or the country as whole, the constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the constitution.

3.9.1.5 The essential principles of the constitution including the fundamental rights contained therein shall apply to all organs of the state at all levels of government.

3.9.2 National Government

3.9.2.1 Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.

3.9.2.2 Where uniformity across the nation is regarded as important with regard to a particular function, then power over that function should be allocated predominantly, if not wholly, to the national government.

3.9.2.3 Where minimum standards across the nation are regarded as important for the delivery of public services, the power to set such standards should be allocated to the national government.

3.9.2.4 The power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

"E"



3.9.3 SPR Government

SPR governments shall have such powers, ~~either exclusively or concurrently with the national government, as may be necessary~~, *as defined in the Constitution*, inter alia, for the purpose of regional planning and development, and the delivery of services and aspects of health, welfare and education, within their boundaries.

3.9.4 Concurrent Powers

Where mutual co-operation is essential or desirable or where it is important to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.

"F"



3.9.5 Residual Powers

Should there be powers
Powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall vest in the national government, ~~alternatively~~ ^{or} in the SPR governments, ~~(this is a fundamental issue which calls for a political decision).~~

The Constitutional Court shall decide whether such powers

or in the national government and the SPR governments concurrently.